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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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B6



FILE: [REDACTED]
SRC-05-230-50773

Office: TEXAS SERVICE CENTER

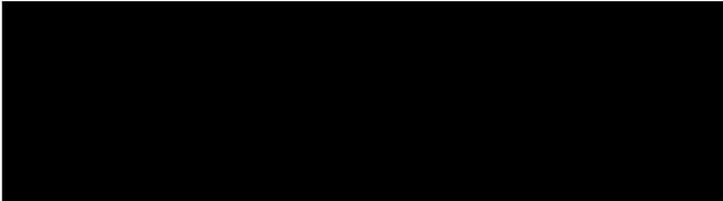
Date: **SEP 10 2008**

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied and a subsequent motion to reopen was dismissed by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal.¹ 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 10, 2006 and March 9, 2006 decisions, the main 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 August 18, 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.

¹ While the instant appeal was pending with the AAO, the petitioner filed another identical immigrant petition (SRC-07-050-53306) on behalf of the beneficiary with the Texas Service Center on December 11, 2006 and the new petition was approved on February 2, 2007.

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 (Shepherders), 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.

(6) If an application is filed under the Schedule A procedures at Sec. 656.15, or the procedures for sheepherders at Sec. 656.16, the notice must contain a description of the job and rate of pay, and must meet the requirements of this section.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.² However, counsel does not submit additional evidence on appeal but resubmit copies of documents already contained in the record of proceeding. The relevant evidence in the record includes a notice of job opportunity and attestation submitted in response to the director's request for evidence (RFE) dated September 7, 2005, and another notice of job opportunity and its attestation.

With the initial filing the petitioner submitted an uncertified Form ETA 750 and a copy of the notice of posting without attestation of posting. Therefore, the director issued an RFE requesting a completed ETA Form 9089, a prevailing wage determination (PWD) from the State Workforce Agency (SWA) having jurisdiction over the proposed area of intended employment, and copies of the notice of filing and in-house media publication. In response to the RFE, counsel submitted a completed ETA Form 9089, a PWD from the Texas Workforce Commission, an attestation dated November 15, 2005 from [REDACTED] (November 15, 2005 attestation), a notice of job opportunity (November 15, 2005 posting notice), and copies of in-house media. The director noted that the November 15, 2005 posting notice was posted at the petitioner's headquarters at [REDACTED], Houston, Texas, not in the location of intended employment indicated on the ETA Form 9089, and thus the petitioner did not post the notice of filing in compliance with the requirements of the regulations. The director also noted that the petitioner marked "not applicable" to questions on the ETA Form 9089 concerning whether or not it provided notice to the bargaining representative and posted the notice for 10 business days. Therefore, the director denied the petition on January 10, 2006. On February 9,

² 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).

2006 the petitioner through counsel filed a motion to reopen with a corrected ETA Form 9089, a new attestation dated January 24, 2006 from [REDACTED] (January 24, 2006 attestation), and a new notice of job opportunity (January 24, 2006 posting notice). The January 24, 2006 attestation states the January 24, 2006 posting notice was posted at the primary worksite indicated on the ETA Form 9089, i.e. [REDACTED]

Houston, Texas for at least 10 working days, from June 6, 2005 to June 27, 2005. The director affirmed her decision of denial based on the inconsistencies between the two attestations.

On appeal counsel asserts that the petitioner is comprised of three major hospitals, namely, Ben Taub General Hospital, Lyndon B. Johnson General Hospital (LBJ General Hospital) and Quentin Mease Community Hospital. Counsel states that in an effort to recruit nurses to adequately staff all these facilities, the petitioner places job postings for nurses in all its major facilities all year round, and therefore, the two attestations are not inconsistent because the job had in fact been posted during the stated dates at the beneficiary's primary job site, LBJ General Hospital as well as at the corporate headquarters.

However, the two attestations and two posting notices in the record do not support counsel's assertion that the same job notice was posted for the same period at LBJ General Hospital at 5656 Kelley Street, Houston, Texas and its corporate headquarters at 2525 Holly Hall, Houston, Texas. The November 15, 2005 attestation states in pertinent part that:

The above-referenced notice was posted on our company premises at 2525 Holly Hall, Houston, Texas 77054 for least 10 (ten) working days, from June 6th, 2005 to June 27th, 2005.

While the January 24, 2006 attestation states in pertinent part that:

The above-referenced notice was posted on our company premises at 5656 Kelley Street, Houston, Texas 77026 for least 10 (ten) working days, from June 6th, 2005 to June 27th, 2005.

The January 24, 2006 attestation uses the exact same language as the November 15, 2005 attestation. The only difference is the address: one attests the posting at 2525 Holly Hall, Houston, Texas 77054 while the other attests the posting at 5656 Kelley Street, Houston, Texas 77026. These two attestations clearly attest that each of the referenced notices were posted at different locations and thus provide inconsistent information about the posting location. Counsel asserts that the notice was posted at 5656 Kelley Street, Houston, Texas 77026 as well as at 2525 Holly Hall, Houston, Texas 77054. However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel does not submit any evidence to support this assertion. Instead, it is not reasonably concluded from the January 24, 2006 attestation that this attestation intends to attest that the petitioner posted the notice of filing at two locations. The petitioner filed another immigrant petition for the beneficiary. On that petition, the petitioner also claimed that it posted the notice of filing at both LBJ General Hospital and the corporate headquarters. To attest the posting at both places during the same period, the petitioner submitted an attestation which states that:

The above Notices were posted at the Bulletin Board near the entrance of the LBJ General Hospital, at 5656 Kelley Street, Houston, Texas main lobby/Job Board, and Administration Office/Human Resources, 2525 Holly Hall, Houston, Texas.

In the instant case, if the petitioner had posted a notice of filing in June 2005 at both the beneficiary's primary worksite and the corporate headquarters, the petitioner would have submitted an attestation attesting the posting at both places instead of two attestations for each place. Therefore, the AAO concurs with the director that the two attestations are inconsistent that cast doubt on the credibility of both posting notices, and accordingly the decision of the director will be affirmed.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has submitted a valid PWD in accordance with § 656.40 and § 656.41. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also 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 regulation at 20 C.F.R. § 656.15(c) requires an Application for Permanent Employment Certification form for Schedule A to include a prevailing wage determination in accordance with § 656.40 and § 656.41.

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

Validity period. The SWA 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 the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.

In the instant case, the petitioner did not submit a PWD with the initial filing of the petition. In response to the director's RFE, counsel submitted a PWD from the Texas Workforce Commission. The PWD indicates that the prevailing wage request was received on September 22, 2006 and determined on September 29, 2006. It also states that the prevailing wage expires on June 30, 2007. Therefore, the PWD in the instant case was valid from the determination date of September 29, 2006 to June 30, 2007. The record shows that the instant petition was filed on August 18, 2005. The PERM regulations expressly state that a Schedule A application must be filed with a PWD and an employer must file their applications within the validity period specified by the SWA. In the instant case the petitioner did not file its schedule A application with a PWD, nor did the petitioner as the employer file its application within the validity period specified by the Texas Workforce Commission. Therefore, the petitioner failed to comply with the PERM regulation with respect to the PWD validity period at the priority date. Since the petitioner failed to obtain a valid PWD in compliance with regulations prior to the filing, any subsequent effort by the petitioner would not correct the PWD validation. If the petitioner was not already eligible when the petition was filed, subsequent developments cannot retroactively establish eligibility as of the filing date, and cited *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Com. 1971.)

In addition, this office also notes that both notices of filing submitted in response to the RFE and on motion do not contain the correct rate of pay in accordance with the regulation at 20 C.F.R. § 656.10(d)(6). While the regulation requires the notice of filing for an application under the Schedule A procedures must contain a rate of pay and the ETA Form 9089 clearly indicates that the offered wage is \$22.85 per hour, the notices of filing list \$21.75 per hour as the offered wage.

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.