

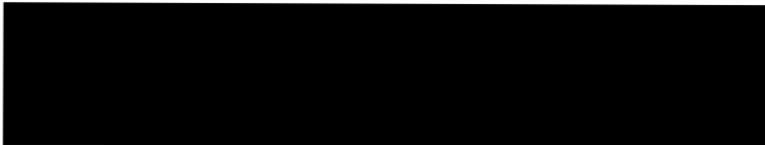
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

FILE: LIN 06 217 51745 Office: NEBRASKA SERVICE CENTER Date: JUN 16 2009
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:

SELF-REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom,
Acting 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 an acute care 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 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.

On appeal, the petitioner,¹ submits additional evidence in order to show that it complied with the regulatory requirements.²

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).

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.

¹ Edward Naughton of Amity International Link, LLC filed the appeal on behalf of the petitioner and submitted a Notice of Entry of Appearance as Attorney or Representative (Form G-28). The regulation at 8 C.F.R. § 103.2(a)(3) provides that a petitioner may be represented by an attorney in the United States, as defined in § 1.1(f), by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4). Section 292.1(a)(4) defines an accredited representative as a person representing an organization described in § 292.2 of this chapter who has been accredited by the Board. (The Board means the Board of Immigration Appeals). In this case, the record indicates that neither Edward Naughton or Amity International Link, LLC has been accredited by the Board. Further, online rosters fail to show that either Edward Naughton or Amity International Link, LLC is an accredited representative. *See* http://www.usdoj.gov/eoir/statspub/recognitionaccreditationroster_withstatecity.pdf. (Accessed 5/08/09).

² 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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 [United States Citizenship and Immigration Services (USCIS)].” 8 C.F.R. § 204.5(d). Here, the priority date is July 19, 2006. The proffered wage is \$29.00 as set forth in Part G of the ETA Form 9089.

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. Therefore these regulations apply to this case because the filing date is July 19, 2006.

The sole issue on appeal in this matter is whether the petitioner posted the notice of the certified position in compliance with the applicable regulations found at 20 C.F.R. Part 656.

The regulation at 20 C.F.R. § 656.10(a)(3) provides that an employer seeking a labor certification for a position under Schedule A must apply in accordance with this section and § 656.15.

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 29 CFR 516.4 or occupational safety and health notices required by 29 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 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 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 § 656.15, or the procedures for shepherders at § 656.16, the notice must contain a description of the job and rate of pay, and must meet the requirements of this section.

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 sec. 656.40 and sec. 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 prescribed in sec. 656.10(d).³

With the initial filing, the petitioner failed to submit a copy of the notice of posting. On March 5, 2007, the director requested this information, explaining the regulatory requirements in detail. In response, the petitioner submitted a copy of the notice of posting with certification of posting from [REDACTED], Vice President of Human Resources, who attested that the exact dates of posting were from "12/1/06 to 3/1/07."

The director denied the petition on June 19, 2007, given that the petitioner's notice of the job opportunity was posted during a period that was not at least 30 days but not more than 180 dates *prior* to filing the application on July 19, 2006, as required by 20 C.F.R. § 656.10(d)(3)(iv). Instead, the posting notice submitted was completed after the petitioner filed the I-140 petition.

On appeal, the petitioner submits additional posting notices, claiming that it did not understand the director's request. The petitioner's contentions are not persuasive. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Moreover, it is noted that the notice of posting offered on appeal that was posted from April 5, 2006 to May 12, 2006 failed to accurately list a rate pay consistent with the proffered wage in this case and failed to

³ The pre-PERM procedure to post the availability of the job opportunity to interested U.S. workers was set forth at 20 C.F.R. § 656.20(g)(1). Relevant to the notice provided to the bargaining representative or, if no bargaining representative, to the employer's employees, the regulation provided in pertinent part:

- (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, but are not limited to, 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).

(Emphasis added.)

accurately list the amount of acceptable experience.⁴ As set forth above, the proffered wage in this case is \$29.00 per hour. The educational and experiential requirements for the offered position are at minimum an associate's degree and 12 months of experience in the job offered. The beneficiary has a four-year bachelor of science in nursing and meets the educational requirement. The record has not documented that she has 12 months of experience in the job offered. Although the regulation at 8 C.F.R. 204.5(l)(2) pertaining to skilled workers permits relevant post-secondary education to be considered as training, it does not mention that it may be considered in lieu of required work experience. Additionally, Part H, 8, of the Form ETA 9089 indicates that employer would not accept an alternate combination of education and experience and the relevant posting submitted in response to the director's request for evidence fails to mention any acceptable alternate combination of education and experience.⁵

In this matter, the AAO concurs with the director's decision that the petitioner's notice of posting the certified position from December 1, 2006 to March 1, 2007 failed to comply with the requirements of 20 C.F.R. § 656.10(d)(3)(iv) because it was not posted between 30 and 180 days *before* filing the application. Since the petitioner failed to post the notice in compliance with regulations prior to the filing, the petition is not approvable. Additionally, it is noted that the beneficiary's qualifications failed to document that she acquired 12 months of experience in the job offered as of the July 19, 2006, priority date.⁶ Going on record without supporting documentary evidence is not sufficient for

⁴Additionally, we note that both the posting submitted in response to the request for evidence as well as on appeal, fail to comply with 20 C.F.R. § 656.10(d) as they list the improper address for the certifying officer. The proper address during the timeframe that the petitioner should have posted would have been:

United States Department of Labor
Employment and Training Administration
Atlanta National Processing Center
Harris Tower
233 Peachtree Street, N.E., Suite 410
Atlanta, GA 30303

See www.foreignlaborcert.doleta.gov/pdf/perm_faqs_3-3-05.pdf.

⁵Additionally, in response to the request for evidence, the petitioner submitted another ETA Form 9089, which listed additional specific skills required in Box H, 14. The petitioner has failed to document that the beneficiary has the required special skills listed.

⁶The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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 at 1002 n. 9.

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.

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ORDER: The appeal is dismissed.