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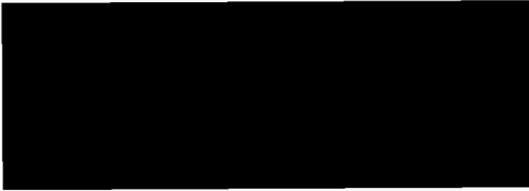
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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Office: NEBRASKA SERVICE CENTER

Date: NOV 23 2009

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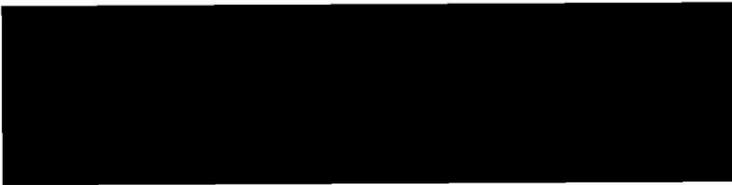
Petitioner:



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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner operates a skilled nursing facility and seeks to employ the beneficiary permanently in the United States as a registered nurse, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

The regulation at 8 C.F.R. § 204.5(l)(2) and section 203(b)(3)(A)(i) of 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii).

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the Department of Labor (DOL) has determined that there are not sufficient United States workers who are able, willing, qualified, and available and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

Based on 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file a Form I-140 petition, “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 DOL’s Labor Market Information Pilot Program.”¹ 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 [U.S. Citizenship and Immigration Services (USCIS)].” 8 C.F.R. § 204.5(d).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer’s completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer’s employees as set forth in 20 C.F.R. § 656.10(d).

On April 22, 2008, the director denied the petition because the petitioner failed to post the position properly for 10 consecutive business days in accordance with 20 C.F.R. § 656.10(d)(1) because the

¹ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

first day of posting, October 16, 2006, was Columbus Day, which is a federal holiday. The director also determined that the petitioner failed to provide the required prevailing wage determination (PWD) from the state of Illinois with the petition.

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 appeal.²

The record shows that the appeal is properly filed, timely, and makes an 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.

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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).

One of the requirements to meet Schedule A eligibility is that the petitioner post the position in accordance with 20 C.F.R. § 656.10(d), which provides:

- (1) In applications filed under § 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:

...

- (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 must 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 . . . In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal

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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

procedures used for the recruitment of similar positions in the employer's organization.

(3) The notice of the filing of an Application for Permanent Employment Certification shall:

- (i) State that 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. . . the notice must contain a description of the job and rate of pay and meet the requirements of this section.

Additionally, section 212 (a)(5)(A)(i) of the Act states the following:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified . . . that

- (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

Fundamental to these provisions is the need to ensure that there are no qualified U.S. workers available for the position prior to filing. The required posting notice seeks to allow any person with evidence related to the application to notify the appropriate DOL officer prior to petition filing. *See* the Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); *see also* Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).

The posting notice accompanying the Form I-140 petition is dated October 9, 2006 to October 20, 2006. It was completed more than 30 days prior to filing, but it was not posted for 10 or more consecutive business days. The AAO notes that Monday, October 9, 2006 was Columbus Day, a federal holiday. The regulation at 20 C.F.R. § 656.10(d)(1)(ii) requires that the notice be posted for at least 10 consecutive business days. Weekends and federal holidays are not “business” days. See www.foreignlaborcert.doleta.gov/faqsanswers.cfm (accessed November 16, 2009). The AAO finds that the petitioner did not make proper notice in accordance with 20 C.F.R. § 656.10(d).

The AAO notes that the petitioner stated in its appeal that Columbus Day was a business day for its purposes and that it also posted a similar posting notice from October 9, 2006 to October 24, 2006, which amounted to more than 10 consecutive business days. The petitioner stated that it did not include this second notice with the Form I-140 petition, as the petition only requires one posting notice. Because the petitioner provided sufficient evidence that it posted the second notice for more than 10 consecutive business days and because the petitioner provided a reasonable explanation as to why the second notice was not provided with the initial filing, the AAO accepts this evidence on appeal and finds that the petitioner did make proper notice in accordance with 20 C.F.R. § 656.10(d). Accordingly, the petitioner has met the regulatory requirements, which require that the posting notice be completed prior to filing the Schedule A application.

Additionally, the AAO finds that the petitioner provided the required PWD with the petition in compliance with 20 C.F.R. § 656.40 from the relevant State Workforce Agency (SWA). The regulation at 20 C.F.R. § 656.40 specifically sets forth that the petitioner must request a wage and the wage obtained is assigned a validity period. In order to use a PWD, “employers must file their [Schedule A] applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.” See 20 C.F.R. § 656.40(c). The petitioner must file Form ETA 9089 and Form I-140 with the prevailing wage determination issued by the SWA having jurisdiction over the proposed area of employment. See 20 C.F.R. § 656.15(b)(i). A petitioner must establish eligibility at the time of filing. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The AAO notes that there is a PWD contained within the record and that counsel states that it was provided with the initial filing of the petition. The PWD was issued by the SWA on October 10, 2006. As this date complies with applicable regulations, the AAO finds that the petitioner posted the notice with a valid PWD.

The petitioner met the posting requirements as set forth in 20 C.F.R. § 656.10(d) and posted the notice with a valid PWD. Accordingly, the petitioner has met the regulatory requirements, which require that the posting notice be completed prior to filing the Schedule A application.

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 met that burden.

ORDER: The appeal is sustained.