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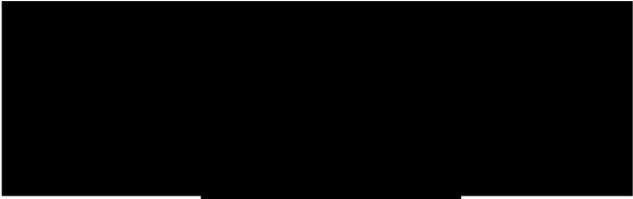
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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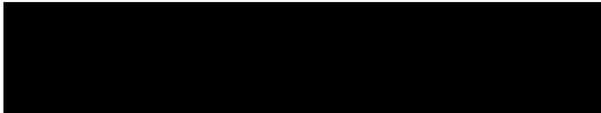
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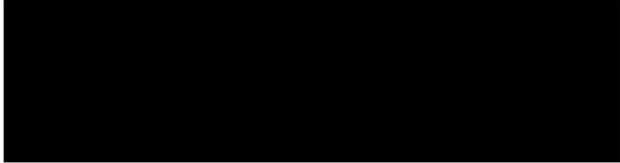
Petitioner:

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.

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).

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 dismissed.

The petitioner operates a therapy services business and seeks to employ the beneficiary permanently in the United States as a physical therapist, a professional or skilled worker pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (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 who are members of the professions. 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 Form I-140, “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.”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). Here, the petitioner filed the I-140 petition on October 24, 2006.

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

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).

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 January 30, 2008, the director denied the petition because the petitioner failed to properly post the position in accordance with 20 C.F.R. § 656.10(d)(1). Specifically, the director found that the petitioner failed to post the notice between 30 and 180 days before filing the petition and that the petitioner had not been clear as to the location of the intended employment. This, proper notice had not been given to prospective U.S. workers.

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.

On appeal, counsel asserts that the petitioner had submitted a notice that had been posted between 30 and 180 days before filing the petition. Counsel also asserts that the location of the position changes over time, but that the labor certification submitted with the petition should cover all locations within the United States.

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 is required to 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:

...

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).

(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 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 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 . . . the notice must contain a description of the job and rate of pay, and must 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 initially submitted with the petition was sufficient as it states that it was posted from September 4, 2006 to September 18, 2006, which means that it was posted for the requisite period and that it was completed between 30 and 180 days before filing the petition on October 24, 2006. This posting notice states that work will be performed in Huntington Station, New York, which is in Suffolk County. However, the petitioner also submitted a separate posting notice on September 14, 2007 in response to the director's Request for Evidence (RFE). This posting notice was deficient as it states that it was posted from April 9, 2007 to April 23, 2007, which means that it was posted for the requisite period, but that it was not completed between 30 and 180 days before filing the petition on October 24, 2006. This posting notice states that work will be performed in East Meadow, New York, which is in Nassau County. The petitioner has submitted both posting notices and has asked the AAO on appeal only to consider the first notice, but the AAO still finds the second posting to be deficient. The petitioner has failed to explain adequately why the AAO should discount the second incorrect posting notice, which it submitted for consideration, and only give weight to the first posting notice submitted.

The AAO notes that the petitioner has submitted three separate therapy services agreements. The first agreement that the petitioner submitted on September 14, 2007 in response to the director's RFE came into effect on April 1, 2004 and states that the physical therapy work would take place in Westchester County, New York. The petitioner submitted two additional therapy services agreements. The second agreement came into effect on April 4, 2006 and states that the physical therapy work would take place in Suffolk County, New York. The third agreement came into effect on February 1, 2007 and states that the physical therapy work would take place in Nassau County, New York.

The AAO notes that the second services agreement would have covered the period of the notice the petitioner posted from September 4, 2006 to September 18, 2006. This posting notice states that work will be performed in Huntington Station, New York, which is in Suffolk County, the location covered by the services agreement. The AAO notes that the third services agreement would have covered the period of the notice the petitioner posted from April 9, 2007 to April 23, 2007. This posting notice states that work will be performed in East Meadow, New York, which is in Nassau County, the location covered by the services agreement. However, the labor certification states that the job would take place in Huntington Station, which is in Suffolk County. Nassau County is not listed as a possible place of employment within the labor certification. Thus, the petitioner did not give sufficient notice of the areas of intended employment as required by Title 20, Code of Federal Regulations, Section 656.10(d)(1)(i).

The petitioner asserts that the Prevailing Wage Determination (PWD) submitted with the petition covers both Suffolk and Nassau counties and provides for a prevailing wage of \$23.23 per hour for the proffered position. Notwithstanding, the AAO finds that the petitioner did not give proper notice of the areas of intended employment.

Based on the foregoing, the posting notice remains deficient and is not in compliance with 20 C.F.R. § 656.10(d). Therefore, the basis for denial has not been overcome.

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.