

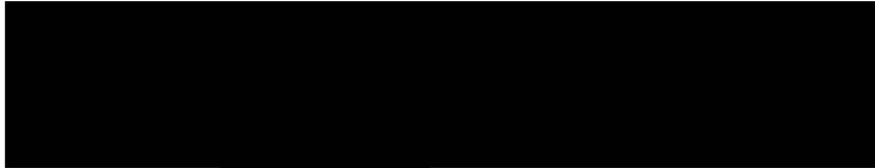
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U.S. Citizenship
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Services

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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: MAY 10 2006
SRC-06-031-51071

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:
[Redacted]

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 director of the Texas Service Center denied the immigrant visa petition and certified her decision to the Administrative Appeals Office (AAO) on appeal. The director's decision will be affirmed. The petition will remain denied.

The petitioner is a hospital. It seeks to sponsor the beneficiary in the United States as a registered nurse supervisor. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The director denied the petition after determining that the posting notice was deficient.

The petitioner did not submit a brief or evidence in connection with the certification.

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 filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse supervisor on November 8, 2005 with accompanying ETA Form 9089, Application for Permanent Employment Certification. 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 Department of Labor (DOL) regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the abbreviation 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. Thus, PERM applies to the instant case.

Aliens who will be permanently employed as professional nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.5 for which the Director of the United States Employment Service 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. Also, according to 20 C.F.R. § 656.5, aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment, or (3) have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) administered by the National Council of State Boards of Nursing.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA-750 at Part A) in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. The Application for Alien Employment Certification shall include:

1. Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.
2. 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 only issue in this case is whether or not the record of proceeding contains a posting notice that complies with regulatory requirements¹. The AAO concurs with the director that the posting notice contained in the record of proceeding fails to comply with regulatory requirements.

Under 20 C.F.R. § 656.10(d)(1), the regulations require the following:

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) and 656.22 (Schedule A), 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 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. Appropriate locations for posting notices of the job opportunity include locations in the immediate vicinity of the wage and hour

¹ The AAO reviewed the other requirements under Schedule A applications under its *de novo* review authority and determined that the petitioner has established its ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2), that the beneficiary is qualified to perform the duties of the proffered position, that the wage offered in this case meets the prevailing wage rate for nursing positions in Broward County, Florida according to DOL's online wage library in accordance with 20 C.F.R. §§ 656.15 and 656.40, and that the position offered involves permanent, full-time employment. However, it is noted that the petitioner failed to submit a properly completed prevailing wage determination issued by the State Workforce Agency (SWA) having jurisdiction over the proposed area of the proffered position which does not conform with 20 C.F.R. § 656.15(b)(i) although the AAO confirmed that the proffered wage meets the prevailing wage rate. The regulation requires the petitioner to submit a properly completed SWA with an ending validity date not less than 90 days or more than 1 year from the date of filing. *See also* "Current Processing of pending Forms I-140 for a Schedule A/Group I or II Occupations Missing Evidence of Compliance with [DOL] Notification/Posting Requirements and Guidance Effective March 28, 2005 pursuant to new DOL regulations . . ." issued by William R. Yates, Associate Director of Operations of CIS on September 23, 2005. The authority to adjudicate appeals is delegated to the AAO by the Secretary of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. 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).

notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a). . . .

(Emphasis in italics in original. Emphasis with underline added).

Additionally, 20 C.F.R. § 656.20(d)(3) requires the following:

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.

With the initial petition, the petitioner submitted a posting notice that meets all of the requirements of 20 C.F.R. §§ 656.10(d)(3)(i) through (v), (d)(4) and 656.17(f). The director denied the petition on December 30, 2005 stating that there was no evidence that the petitioner posted the posting notice for ten consecutive business days.

The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations.² The AAO concurs with the director's decision. The director cited 29 C.F.R. § 2510.3-102(e) for DOL's definition of "business day" as "any day other than a Saturday, Sunday or any day designated as a holiday by the Federal Government." A review of the discussion of changes made to the permanent labor certification application process from "Labor Certification for the Permanent Employment of Aliens in the United States: Implementation of New System" illustrates that the drafters of PERM changed the old requirement from "10 consecutive days" to "10 consecutive *business days*" to expand the notice requirement for petitioning entity's employers (emphasis added). See 69 Fed. Reg. 77326, 77339 (December 27, 2004). The regulations do not provide exemptions for entities whose business operations continue on weekends and holidays. Therefore, the director correctly interpreted PERM's duration requirement for the posting notice.

Thus, the AAO affirms the director's decision that the petitioner has failed to submit a regulatory-prescribed posting notice that conforms to the regulatory requirements for Schedule A, Group I nurse petitions.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The director's decision on December 30, 2005 is affirmed. The petition remains denied.

² 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).