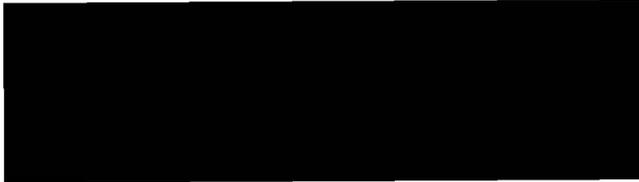




U.S. Citizenship  
and Immigration  
Services

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FILE: \_\_\_\_\_ Office: NEBRASKA SERVICE CENTER Date: **OCT 02 2006**  
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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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Acting Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a medical staffing service. It seeks to employ the beneficiary permanently in the United States as a physical therapist. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The acting director determined that the evidence submitted does not demonstrate that notice of filing the Application for Permanent Employment Certification was provided to the petitioner's employees' bargaining representative or posted at the intended place of employment as prescribed in 20 C.F.R. § 656.10 (d).

On appeal, counsel submits a brief and additional evidence.

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 has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as a skilled worker (physical therapist). Aliens who will be employed as **physical therapists are listed on Schedule A. Schedule A is a list of occupations found at 20 C.F.R. § 656.10.** The Director of the United States Employment Service has determined that an insufficient number of United States workers are able, willing, qualified, and available to fill the positions available in those occupations, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

The regulation at 20 C.F.R. § 656.10 (d) states,

*Notice.* (1) In applications filed under . . . [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 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.

The regulation at 20 C.F.R. § 656.20(g)(3) states,

Any notice of the filing of an Application for Alien Employment Certification shall:

- (i) state that applicants should report to the employer, not to the local Employment Service office;
- (ii) 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; and
- (iii) State that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor.

In this case, the Form I-140 petition was filed on December 13, 2005. With the petition counsel provided a copy of the notice of the proffered position. A certification from the petitioner's CEO stating that the notice had been posted accompanied that notice. That certification states,

[This] notice was posted in a conspicuous place at the offices of [the petitioner] for a period of ten consecutive working calendar days, from 10-26-05 to 11-7-05.

On March 9, 2006, the Acting Director, Nebraska Service Center, denied the petition, noting that the certification provided with the notice of the proffered position does not indicate that the notice was posted for ten consecutive business days<sup>1</sup> as required by 20 C.F.R. § 656.10(d)(ii).

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<sup>1</sup> The decision notes that October 29<sup>th</sup> and 30<sup>th</sup> and November 5<sup>th</sup> and 6<sup>th</sup> of 2005 fell on weekends. The decision also notes that the petitioner failed to demonstrate that the notice of the proffered position was posted in any in-house media as required by 20 C.F.R. 656.10(d)(1)(ii), but declines to rely on that ground as a basis for denial of the petition. Counsel argues that, pursuant to the terms of that regulation, no such in-house media publication was required. Because the decision of denial does not rely on that basis this office need not discuss the issue further.

On appeal, submitted a brief and additional evidence.

The additional evidence provided consists of three additional certifications and posting notices. The posting notices are essentially identical to the notice submitted with the petition, other than the dates shown on them. One of those certifications states that the notice was posted at the petitioner's offices from November 7, 2005 to November 27, 2005. Another states that the notice was also posted at the petitioner's offices from October 26, 2005 to December 7, 2005.

The third certification states that the associated notice of the proffered position was posted from March 17, 2006 to March 31, 2006. A separate sheet provided with that certification and notice states that the notice was posted at the locations of three health care companies. This office infers that those health care companies are clients of the petitioner. That additional sheet is not signed and the statement pertinent to where the notice was posted is unattributed. Further, whether the beneficiary would be employed at one of those three institutions, rather than somewhere else, is not stated.

Counsel also provided printouts of DOL guidance pertinent to petitions pursuant to Schedule A.<sup>2</sup> Highlighted portions of the first printout state that posting a notice indefinitely satisfies the posting requirement so long as it complies with the various requirements for postings.

A highlighted portion of the second printout states that the notice of the proffered position, ". . . must be posted for at least 10 consecutive business days (Monday through Friday, regardless of whether the facility operates seven days a week)." [Emphasis in the original.]

That same printout states that ". . . [N]otice of the proffered position must be posted between 30 and 180 days prior to the filing of the Form I-140 petition." [Emphasis in the original.]

Another highlighted portion describes the locations at which the notice must be posted if the petitioner does not know the location at which it would actually employ the beneficiary.

In the brief counsel argues that the notice was, in fact, posted for ten consecutive business days. Counsel further stated that the petitioner posted the notice of the proffered position "indefinitely," but does not state where the notice was posted, when the "indefinite" posting began, whether it is continuing or, if not, when it ended. Counsel argues that, in the alternative, the petitioner should not be penalized for having a definition of "business days" that differs from that of CIS, given that the petitioner had no notice of the definition employed by CIS. Counsel notes that the petition was also denied based on the location at which the notice of the proffered position was posted.

The regulations at 20 C.F.R. § 656.10(d) require that the notice be posted for at least ten "consecutive business days" and that evidence of such posting be submitted with the Application for Alien Employment Certification.

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<sup>2</sup> Available at <<http://workforcesecurity.doleta.gov/foreign/faqs.asp>>.

One printout provided contains Guidance for Schedule A Blanket Labor Certifications. That printout makes clear what the definition of “business days” is. Counsel asserts, however, that because the instant petition was submitted prior to the February 14, 2006 release date of that guidance the petitioner should not be bound by it.

The regulation at 20 C.F.R. § 656.10(d) indicates that the posting notice must remain in place for ten “consecutive business days.” Counsel states that the petitioner’s offices are open every day and further states that this is standard in the petitioner’s industry. Counsel urges that, therefore, all days should count as business days for the purposes of compliance with that regulation. Counsel argues that, in the alternative, the petitioner had no notice that CIS would rely on the definition of “business day” found at 29 C.F.R 2510.3-102(E), and that the definition should not, therefore, apply.

Yet further counsel argues that, even if CIS is going to apply the definition of “business days” retroactively it’s own guidance indicates that petitions should not be denied on that basis. Counsel notes that the guidance provided indicates that the posting notice must be in place 30 to 180 days prior to filing the Form I-140 and that, if the posting was not made pertinent to this new requirement, a petition should be denied. Because that guidance is silent as to denying a petition that was not posted for ten consecutive business days pursuant to the definition in that guidance, counsel argues, the petition should not be denied on that basis.

The revised version of 20 C.F.R. § 656.10 became effective on March 28, 2005. The petition in this matter was filed on December 13, 2005, when the new regulatory language was in effect. The new regulatory language, therefore, governs this petition and the petitioner is obliged to show that the notice was posted for ten consecutive business days.

The guidance submitted is only an explanation of the then existing regulations. It did not enact new law, but explained existing law. In so doing it merely gave “business day” the definition it is ordinarily accorded. The definition was not changed. Whether a petition was filed before or after the publication of that guidance is immaterial. The regulation in question was published and effective on March 28, 2005 and so long as the petition in this matter was filed after that date, which the petition in the instant case was, the petitioner is obliged to observe that regulation. That the guidance is silent on the matter does not indicate that petitions that are not supported by the appropriate evidence should be approved.

Counsel has also provided evidence that the notice of the proffered position was posted at other times during the permissible period. The notice of the proffered position must be posted for ten days beginning between 30 and 180 days prior to filing the Form I-140 petition. In the instant case, as the petition was filed on December 13, 2005 the notice must have been posted sometime between June 16, 2005 and November 13, 2005.

Two of the certifications submitted on appeal show that the notice was posted from November 7, 2005 to November 27, 2005<sup>3</sup> and that it was posted from October 26, 2005 to December 7, 2005.<sup>4</sup> The initial posting

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<sup>3</sup> Although this notice was not posted for ten consecutive business days between June 16, 2005 and November 13, 2005 it was initially posted on a day during that period and remained posted for more than ten consecutive business days. Whether this notice in itself would demonstrate compliance with the regulations is unclear. Because the other posting notice was posted for ten consecutive business days all of which were within the allowable period, however, and because both of those notices are otherwise flawed, this office need not reach this additional issue.

dates shown on both of those certifications were within the permissible period and both posting periods exceeded the required ten consecutive business day period.

As was noted above, however, the record indicates an issue as to the location at which the notice of the proffered position was posted. The ETA Form 9089 submitted in the instant case states that the petitioner would employ the beneficiary at [REDACTED]. That appears to be an address occupied by the petitioner, however. As the petitioner is a staffing service, and provides physical therapists to clients, the beneficiary is unlikely to be employed primarily at that location. The Form I-140 petition states that the petitioner would employ the petitioner at "Various locations in Houston, TX."

The regulation at 20 C.F.R. § 656.20(g)(1)(i) states that if the posting requirement of 20 C.F.R. § 656.20(g)(1) is to be complied with by posting then the notice must be posted "at the location of intended employment."

Three of the certifications provided with the posting notices provided in this case, however, show that the notices were posted "in a conspicuous place in the [petitioner's] offices . . ." The petitioner's offices are apparently not the location of intended employment in this matter.

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. Those goals cannot be accomplished by posting a notice at the petitioner's offices. The notice must be posted at the location where the beneficiary would be employed, in accordance with the requirements of 20 C.F.R. § 656.20(g)(1)(i). Those postings are insufficient to overcome the finding that the position was not posted in compliance with 20 C.F.R. § 656.20(g)(1)

An unsigned unattributed statement that the subject posting notice was posted at three healthcare facilities accompanies the remaining certification. That statement does not indicate that the beneficiary will be employed at any of those locations, nor that it is an exhaustive list of the locations at which the petitioner might employ the beneficiary. Further, whether an unsigned unattributed statement is sufficient to show compliance with the posting requirement is unclear. The notice to which that certification applies, however, was posted on March 17, 2006, which was after the permissible period. That posting notice and the certification are insufficient to show compliance with the requirements of 20 C.F.R. § 656.20(g)(1).

Yet further counsel states that the notice in this matter was posted indefinitely. Counsel does not state that he personally posted the notice, nor that he observed it, nor what other basis he may have for making that statement and, in any event, counsel's assertions are not evidence. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

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<sup>4</sup> The notice was also posted from March 17, 2006 to March 31, 2006. As that was after the permissible period, however, that additional posting is inapposite to the instant petition.

Further, counsel does not indicate that the notice was posted at the location where the petitioner would employ the beneficiary or, in the alternative, that it was posted at all of the various alternative locations at which the petitioner might employ the beneficiary.

Further still, as was noted above the meaning counsel attributes to “indefinitely” is unclear. Absent clarification the assertion that the notice was posted indefinitely is insufficient to show that the posting conformed to the ten-day requirement of 20 C.F.R. § 656.10(d). The guidance states that indefinite posting may satisfy the ten-day requirement so long as the other requirements of the regulations are satisfied. Merely stating that the petition was posted indefinitely does not demonstrate that the notice of the proffered position was posted for ten consecutive business days during the permissible period and the petition may not, on the strength of such a statement, be approved.

For these various reasons the “indefinite” posting of the proffered position attested to by counsel does not satisfy the requirements of 20 C.F.R. § 656.10 (d).

None of the evidence provided shows that the position was posted in compliance with the requirements of 20 C.F.R. § 656.20(g)(1). 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.