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U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
WAC 05 209 51322

Office: CALIFORNIA SERVICE CENTER

Date: **NOV 19 2007**

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 Director, California Service Center, denied the preference visa petition. The petition 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 staff nurse. The petitioner asserts that the beneficiary qualifies for Schedule A, Group I labor certification pursuant to 20 C.F.R. § 656.5(a). The director determined that the petitioner had not properly filed the I-140 petition between 30 and 180 days after posting the notice of filing of an application for permanent employment certification at its facility, pursuant to 20 C.F.R. 656.10(d)(3)(iv). Therefore, the director denied the petition.

The record shows that the appeal is properly filed and timely. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 1, 2006 denial, the issue in this case is whether the petitioner established that it properly filed the I-140 employment-based petition between 30 and 180 days after posting its notice to file an Application for permanent employment certification at its facility.

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.

On July 19, 2005, the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, for classification of the beneficiary under section 203(b)(3)(A)(i)(i) of the Act as a registered nurse. Aliens who will be permanently employed as registered nurses are identified on Schedule A as set forth at 20 C.F.R. § 656.5 as being aliens who hold occupations for which it has determined there are not sufficient U.S. 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 U.S. workers who are similarly employed.

An employer shall apply for a labor certification for a Schedule A occupation by filing an ETA Form 9089, Application for Permanent Employment Certification, in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. Pursuant to 20 C.F.R. § 656.15, a Schedule A application shall include:

- 1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with § 656.40 and § 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 § 656.10(d).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Given that the instant matter was accompanied by an application for Schedule A designation, the priority date for this petition is the date the ETA Form 9089 was properly filed with CIS or July 19, 2005. See 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$23.26 an hour or \$48,380.80 annually.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup> Counsel submits a brief.

Relevant evidence in the record includes the following: the posting notice submitted by the petitioner that indicates the notice was posted at the petitioner's facility from May 30 to June 30, 2005, and the petitioner's I-140 petition that indicates the submission of the petition and Form ETA 9089 on July 19, 2005. The record does not contain any other documentation relevant to the issue of whether the petitioner properly filed the I-140 petition and Application for Permanent Alien Employment Certification following the posting of notice at its facility.

The regulation at 20 C.F.R. § 656.10(d)(3), states, in pertinent part:

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.

The record reflects that the petitioner posted notice of filing an Application for Permanent Employment Certification at its facility from May 30, 2005 to June 30, 2005 and that the petitioner filed the Application for Permanent Employment Certification and I-140 petition on July 19, 2005. The regulation at 29 C.F.R. § 2510.3-120(e) defines a "business day" as "any day other than Saturday, Sunday or any other day designated as a holiday by the Federal Government." Thus, the petitioner in the instant petition posted the notice of filing for more than the requisite ten business days. The record also reflects that the petitioner signed the Form ETA 750 on July 19, 2005, a period of time only nineteen days after the ending period for the petitioner's posting of the filing notice.

On appeal, counsel asserts that the posting notice was filed for the requisite ten business days as stipulated by the regulations and that the I-140 petition and Form ETA 9089, Application for Permanent Employment Certification, was then filed 39 days after the end of the ten business days required for posting of the petitioner's notice to file the ETA 9089. In her brief, counsel states that the petitioner posted the job opening for 30 consecutive days from May 30, 2005 to June 30, 2005. Counsel further notes that the filing of the I-140 petition was made shortly after the new PERM regulations were published and that petitioners and

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<sup>1</sup> 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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

practitioners were confused about the new posting requirements and how they related to filings for registered nurses with CIS.

Counsel states that in the instant petition, the posting from May 30, 2005 to June 30, 2005 indicated a period of 30 consecutive days, or 24 business days. Counsel states that the petitioner "over posted," and that in reality as the petitioner is in need of nurses, it consistently posts, advertises, and recruits internationally, so that the posting notice could have indicated a period of posting of 365 days. Counsel notes that the director's decision determined that the petitioner should have been filed on or after July 30, 2005, a period of time eleven days later than when the petition was actually filed, to be properly filed pursuant to the regulations.

Counsel then acknowledges that the purpose of the 30 day waiting period is to allow ample time for a job applicant to apply for the position and is designed to protect U.S. workers. However, counsel states that in the case of a registered nurse, where the U.S. Department of Labor (DOL) has already designated a shortage of workers and has designated registered nurses as Schedule A beneficiary, the 30 day waiting period makes little sense. Counsel also asserts that although the DOL regulations are in place and that the petitioner may not have met them within the exact letter of the law, in reality the petitioner did meet them. Counsel asserts that if the petitioner in the instant petition had indicated he posted the notice for the minimum number of ten business days, and then signed the posting and submitted the I-140 petition after 30 days, the actual day of filing the I-140 petition and certification, July 19, 2005, was appropriate. Counsel notes that in fact the petitioner posted the notice for requisite ten business days and that the I-140 petition was submitted to CIS more than 30 days after the requisite ten business days of posting.

Counsel's assertion that the petitioner, while not meeting the letter of the law, has actually properly filed the I-140 petition and the Form ETA 9089 is not persuasive. While the AAO acknowledges that the petitioner properly posted the notice of filing with regard to the requisite ten business days stipulated at 20 C.F.R. § 656, the petitioner did not comply with the regulations at 20 C.F.R. § 656.10(d)(3)(iv) that stipulate the petition must be filed between 30 and 180 days after the posting of the filing notice at the petitioner's facility. Counsel's assertions with regard to the petitioner only posting the notice for ten days and then filing the petition properly on July 19, 2005 is conjecture.

The AAO also notes that the record fails to demonstrate that the petitioner published notice of filing an Application for Permanent Employment Certification in any and all of its in-house media in accordance with the normal procedures used for the recruitment of similar positions in its organization, an additional requirement set forth at 20 C.F.R. § 656.10(d)(1)(ii). The regulation at 20 C.F.R. § 656.10(d)(1) provides in relevant part:

In applications filed under §§ 656.15 (Schedule A), 656.16 (Shepherders), . . . 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...
- (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.

Any assertion that the petitioner may satisfy this requirement by documenting for the record that it published an *announcement of the job vacancy*, which is the subject of its Application for Permanent Employment Certification, would be misplaced. *See* 20 C.F.R. § 656.10(d)(1)(ii). The petitioner must establish eligibility at the time the Form I-140 was filed. *See* 8 C.F.R. § 103.2(b)(12). Thus, this deficiency would not be overcome were the petitioner to publish notice of its application for employment certification at this date.

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, the petitioner has not met the burden of establishing that it properly filed the I-140 petition and Form ETA 750. The AAO also notes that the petitioner has not satisfied the requirement to establish that it published the posting notice in any and all in-house media, in accordance with the normal procedures used for the recruitment of similar positions, pursuant to 20 C.F.R. § 656.10(d)(1)(ii). In any future proceedings, this issue must be addressed by the petitioner.**

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 appeal is dismissed.