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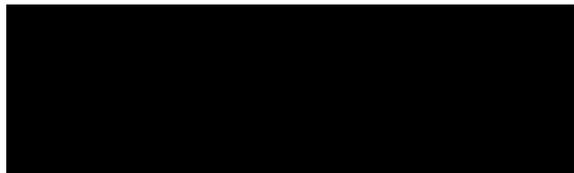
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: SEP 28 2007

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IN RE:

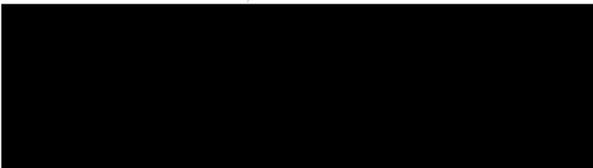
Petitioner:

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 Director, Texas Service Center, denied the instant preference visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a skilled nursing facility. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for Schedule A, Group I labor certification pursuant to 20 C.F.R. § 656.5(a). As required by statute, a Form 9089 Application for Permanent Employment Certification accompanied the petition.

The director determined that the petitioner had not established that it had properly posted the notice of filing the application for permanent employment certification at the place where it intends to employ the beneficiary. The director denied the petition accordingly.

The record shows that the appeal was properly and timely filed¹ and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated that it posted a notice of the proffered position in accordance with the regulations.

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 granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

On February 13, 2006, the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, for classification of the beneficiary under section 203(b)(3)(A)(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 been determined that 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.

The regulation at 20 C.F.R. 656.10(d)(1) states, in pertinent part,

In applications filed under §§656.15 (Schedule A), 656.16 (Shepherders) and 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:

(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

¹ The record shows that the appeal was initially submitted on July 12, 2006, before the deadline for its submission. Although that appeal was then returned for reasons that are not clear from the record, this office considers its submission timely.

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 shall be posted for at least 10 consecutive business days.** The notice shall be clearly visible and unobstructed while posted and shall 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).

[Emphasis added.]

Pursuant to 20 C.F.R. § 656.15(b), 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).

Although the regulations previously stated the required length of posting as "ten consecutive days," that requirement was recently revised to "10 consecutive business days." *Compare* 8 C.F.R. § 656.10(d)(1)(2005) with 20 C.F.R. § 656.20(g)(ii)(1991). The revised regulation became effective on March 28, 2005. 69 Fed. Reg. 77386 (Dec. 27, 2004). The petition in this matter was filed on February 13, 2006, 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 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 evidence properly in the record including evidence properly submitted on appeal.² In the instant case the record contains a notice of the proffered position and an affidavit pertinent to the posting of the proffered position. The record contains no other evidence pertinent to the posting of the proffered position.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19

The notice of the proffered position contains the appropriate information as required by the regulations. The affidavit pertinent to its posting is dated November 1, 2005 and indicates that the notice was posted on October 10, 2005 and remained posted until October 20, 2005.

The director denied the petition on May 11, 2006, finding that the notice had not remained posted for ten consecutive working days as required by 20 C.F.R. § 656.10 (d)(ii), set out in pertinent part above.

On appeal, counsel argued that because the petitioner's facility is in operation every day and night the notice was posted for ten consecutive working days.

Although 20 C.F.R. § 656.10 does not define the term "business day" for the purposes of posting, CIS and DOL rely on the definition at 29 C.F.R. § 2510.3-102(e). *See also* Black's Law Dictionary 402 (7th ed. 1999)(definition of business day). Consistent with common usage, both definitions exclude Saturdays and Sundays. DOL's definition explicitly excludes Federal holidays as business days.

The affidavit that attests to the posting of the proffered position indicates that it was posted on October 10, 2005. That day was Columbus Day, a Federal holiday. The notice remained posted until October 20, 2005, a total of eight business days, counted inclusively. It was not, therefore, posted for ten consecutive business days as required by the regulations. The petition was correctly denied on this basis, which has not been overcome on appeal.

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 that burden.

ORDER: The appeal is dismissed.