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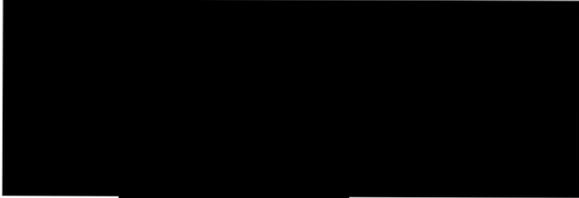
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
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Office: NEBRASKA SERVICE CENTER

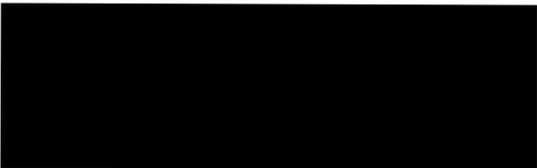
Date: **AUG 27 2008**

IN RE: Petitioner:
 Beneficiary:



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.

A handwritten signature in black ink, appearing to read "Loi Br" with a flourish underneath.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 a hospital. 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). The director determined that the petitioner had not established that it had properly posted a notice of filing an application for permanent employment certification for ten consecutive business days at the **beneficiary's place of employment. Therefore, the director denied the petition. Although not a part of the director's decision, the director noted that the record does not include any documentary evidence or employer attestation concerning the publication of the notice in any in-house media as required by 20 C.F.R. § 656.10(d)(1)(ii) and that the petitioner only submitted one original copy of the Form ETA 9089, Application for Permanent Employment Certification, instead of the required two original copies.**

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 May 3, 2007 denial, the issue in this case is whether the petitioner established that it properly posted notice of filing an application for permanent employment certification for ten consecutive business days at the beneficiary's place of employment.

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 or seasonal nature, for which qualified workers are not available in the United States.

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.

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 registered nurse. Aliens who will be employed as professional nurses are listed on Schedule A. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.10 with respect to which the Director of the United States Employment Service has 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 similarly employed.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be "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." 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 [Citizenship and Immigration Services (CIS)]." 8 C.F.R. § 204.5(d). In the instant case, the priority date is July 13, 2006.

The regulations set forth in Title 20 of the Code of Federal Regulations also provide specific guidance relevant to the requirements that an employer must follow in seeking certification under Group I of Schedule A. An

employer must file an application for a Schedule A labor certification with CIS. It must include evidence of prearranged employment for the alien beneficiary signified by the employer's completion of the job offer description on the application form and evidence that the 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). 20 C.F.R. § 656.15(a) and (b).

The regulation at 20 C.F.R. § 656.10¹ states, in pertinent part,

(c) *Attestations.* The employer must certify to the conditions of employment listed below on the Application for Permanent Employment Certification under penalty of perjury under 18 U.S.C. 1621(2). Failure to attest to any of the conditions listed below results in a denial of the application.

- (1) The offered wage equals or exceeds the prevailing wage determined pursuant to § 656.40 and § 656.41, and the wage the employer will pay to the alien to begin work will equal or exceed the prevailing wage that is applicable at the time the alien begins work or from the time the alien is admitted to take up the certified employment;
- (2) The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a prevailing wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage;
- (3) The employer has enough funds available to pay the wage or salary offered the alien; . . .

The prevailing wage rate is defined by the regulation at 20 C.F.R. § 656.40 as follows:

- (a) *Application process.* The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. . . .
- (b) *Determinations.* The SWA determines the prevailing wage as follows:
 - (1) Except as provided in paragraphs (e) and (f) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms-length between the union and the employer, the wage rate set forth in the CBA agreement is considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it is considered the "prevailing wage" for labor certification purposes.
 - (2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraph

¹ 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. The current Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the Department of Labor by the acronym 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.

(b)(3) of this section, of the wages of workers similarly employed in the area of intended employment. The wage component of the DOL Occupational Employment Statistics Survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey under paragraph (g) of this section.

- (3) If the employer provides a survey acceptable under paragraph (g) of this section that provides a median and does not provide an arithmetic mean, the prevailing wage applicable to the employer's job opportunity shall be the median wages of workers similarly employed in the area of intended employment.
- (4) The employer may utilize a current wage determination in the area under the Davis-Bacon Act, 40 U.S.C. 276a et seq., 29 C.F.R. part 1, or the Contract Act, 41 U.S.C. 351 et seq.
- (c) *Validity period.* The SWA must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a SWA PWD, employers must file their applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.
- (d) *Similarly employed.* For purposes of this section, similarly employed means having substantially comparable jobs in the occupational category in the area of intended employment, except that, if a representative sample of workers in the occupational category can not be obtained in the area of intended employment, similarly employed means:
 - 1) Having jobs requiring a substantially similar level of skills within the area of intended employment; or
 - 2) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

The Department of Labor (DOL) maintains a website at www.ows.doleta.gov which provides access to an Online Wage Library (OWL). OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically.²

On July 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 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.

² The OWL requires that the city, state, and county of the employment location be known in order to identify the prevailing wage rate.

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(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).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. 8 C.F.R. § 204.5(g)(2). 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 on July 13, 2006. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$26.81 an hour or \$55,764.80 annually.³

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 relevant evidence in the record, including new evidence properly submitted on appeal.⁴

Relevant evidence in the record includes counsel's brief, a copy of the posted notice, a copy of a prevailing wage request from the Commonwealth of Virginia, copies of two positions for a registered nurse in oncology (one full-time and one PRN/on-call) from the website <http://www.healthcaresource.com/virginia/index.cfm> (accessed on February 2, 2006), a copy of a nursing position opening list as of June 5, 2003, a copy of a letter, dated June 29, 2007, from [REDACTED] Executive Assistant to the CNO, for the petitioner, and a letter, dated March 14, 2006, from [REDACTED] Resources, for the petitioner stating that the beneficiary has been employed with the petitioner since June 10, 2003 as a Clinical Nurse III, earning a base hourly rate of \$26.81. The record does not contain any other documentation relevant to the issue of whether the petitioner properly posted notice of filing an application for permanent employment certification at its facility or whether it published such notice in its in-house media in accordance with those procedures used to announce the availability of vacancies similar to that which is the subject of the application for permanent employment certification in this matter.

The regulation at 20 C.F.R. § 656.10(d)(1) provides in relevant part:

In applications filed under §§ 656.15 (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:

³ It should be noted that the prevailing wage is \$25.88 per hour or \$53,830.40 annually.

⁴ 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).

(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 was used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

According to the regulation at 20 C.F.R. § 656.10(d)(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.

The record reflects that the petitioner posted notice of filing an application for permanent employment certification at its facility from April 28, 2006 through May 8, 2006. This office notes that April 29, April 30, May 6, and May 7 were on the weekend. Thus, the notice was posted for only eight consecutive business days. This office finds that this posting does not meet the requirements for posted notices to the employer's employees as set forth at 20 C.F.R. § 656.10(d)(1)(ii). A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971), 8 C.F.R. § 103.2(b)(1), (12).

The letter, dated June 29, 2007, from [REDACTED] Executive Assistant to the CNO, for the petitioner states:

Given the nature of the business [the petitioner], including the nursing department, is open to the public 24 hours a day, seven days a week. Any and all job postings relating to the nursing department are accessible to potential applicants 24 hours a day, 7 days a week. In fact, the posting for this particular case, [the beneficiary], was posted in the nursing office and was accessible to potential applicants 24 hours a day, seven days a week, for a period much longer than 10 business days.

On appeal, counsel argues:

[T]he new regulation does not define what the term business day means. The fact that this term was left undefined, clearly means that a realistic interpretation is due. The term business days has to be interpreted in accordance with the nature of the specific business or market at issue. If a business or market is open for business 7 days a week, it should follow that the term business days is defaulted to the characteristic of such business or market. This is so because the purpose of the regulation is satisfied as long as the notice of filing is physically available to the public and the position is advertised and reachable to the general public in an efficient manner. That is, every day of the week, including Saturdays and Sundays.

Counsel and [redacted] are mistaken. The Department of Labor's website (accessed on July 23, 2008) at <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> for answering frequently asked questions regarding time periods specifically states:

Time Periods are the number of days during which an activity must take place. Example of time periods are the requirements a job order must be placed for 30 days and the requirement that a Notice of Filing must be posted for ten consecutive business days. When counting a time period, both the start date and end date are included in the count.

* * *

As another example, the regulation requires a Notice of Filing posting for a time period of ten consecutive business days. If the order is posted on Monday, April 30, 2007, Monday is day 1, Friday, May 4th, is day 5; the following Monday, May 7th, is day 6; and Friday, May 11th, is day 10. . . .

The Department of Labor makes no exception for businesses that are open seven days a week, twenty four hours a day. Therefore, the Notice of Filing posting does not meet the regulation at 20 C.F.R. § 656.10(d)(1)(ii).

Beyond the decision of the director, the record in this case also lacks conclusive evidence as to whether the address of the appropriate Certifying Officer was listed on the notice of filing. 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).

The notice of filing of an application for alien employment certification states that it was provided as a result of the filing of an application for permanent alien labor certification and 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. It does not, however, provide the address of the appropriate Certifying Officer; and, therefore, the notice of filing does not meet the requirements of 20 C.F.R. § 656.10(d)(3)(iii).

Another issue mentioned by the director, but not part of his decision is whether or not the record contains documentary evidence or an employer attestation concerning the publication of the notice in the petitioner's in-house media as required by 20 C.F.R. § 656.10(d)(1)(ii).

On appeal, counsel claims that evidence of this advertisement was actually submitted as part of the application and will be resubmitted if necessary.

With regard to the publication of the notice in the petitioner's in-house media, the regulation at 20 C.F.R. § 656.10(d)(1)(ii), states in pertinent part:

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 was used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

In the instant case, the petitioner submitted copies of two positions for a registered nurse in oncology (one full-time and one PRN/on-call) from the website <http://www.healthcaresource.com/virginia/index.cfm> (accessed on February 2, 2006) and a copy of a nursing position opening list as of June 5, 2003.

When asked if the language on the electronic in-house media Notice of Filing needs to be exactly the same as the language on the physical in-house Notice of Filing, the Department of Labor replied with the following:⁵

The regulations require that the employer publish the notice internally using in-house media - - whether electronic or print - - in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The language should give sufficient notice to interested persons of the employer's having filed an application for permanent alien labor certification for the relevant job opportunity. It is not required to mirror, word for word, the physical posting. In most cases, the physical posting language will be the most efficient way to electronically post the Notice of Filing; in others, the software program used to create the electronic in-house posting may be unable to accept all of the language used in the physical Notice of Filing. In every case, the Notice of Filing that is posted to the employer's in-house media must state the rate of pay and apprise the reader that any person may provide documentary evidence bearing on the application to the Certifying Officer. If there is insufficient space to include the Certifying Officer's address, then information as to where the address can be found must be provided.

In the instant case, the petitioner's in-house media notices do not meet the requirements above in that they do not state the rate of pay, do not apprise the reader that any person may provide documentary evidence bearing on the application to the Certifying Officer, and do not include the Certifying Officer's address or information as to where the address can be found.

The final issue is whether or not the petitioner submitted two original Forms 9089 as required when filing a visa petition under Schedule A.

The regulation at 20 C.F.R. § 656.15(a) states in pertinent part:

⁵ See the website at <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (accessed on July 23, 2008).

Filing application. An employer must apply for a labor certification for a Schedule A occupation by filing an application in duplicate with the appropriate DHS office, and not with an ETA application processing center.

The record of proceeding in this case contains only one Form ETA 9089, and therefore, does not meet the requirements of 20 C.F.R. § 656.15(a) as stated above.

The AAO has reviewed the record in this case, and concurs with the director's denial for the reasons expressed herein. Although Schedule A regulations are designed to address concerns regarding the shortage of healthcare workers such as registered nurses and physical therapists, this concern does not permit CIS to overlook the specific regulatory provisions relating to the petitioner's burden of meeting those regulatory requirements as of the priority date of July 13, 2006. In the instant case, the petitioner has not met those requirements.

For the above stated reasons, the AAO concurs with the director's decision that the petition may not be approved. Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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.