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U.S. Citizenship
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FILE: [REDACTED] SRC 06 224 51546

Office: TEXAS SERVICE CENTER

Date:

JUL 01 2008

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

The petitioner is a medical center 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 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 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 August 8, 2006 denial, the issue in this case is whether the petitioner established that it properly posted notice of filing the application for permanent employment certification at the beneficiary's place of employment.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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.

On July 19, 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.

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).

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 19, 2006. *See* 8 C.F.R. § 204.5(d).

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.¹ Relevant evidence submitted on appeal includes counsel's statement, a statement dated September 7, 2006 from Wendy Press, the petitioner's Recruitment Coordinator, a re-submission of the Notice of the Filing of an Application for Alien Employment Certification, and a previous decision dated August 24, 2006 issued by the AAO.² The record does not contain any other documentation relevant to the issue of whether the petitioner posted notice of filing the application for permanent employment certification at its facility.

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 (Sheepherders), . . . 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.

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;

¹ 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).

² We note that counsel does not provide the decision's published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

- 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.

In this case, the record reflects that the petitioner posted a notice of the filing of the application for permanent employment certification for ten (10) consecutive business days and that this notice was dated as being posted from February 6, 2005 to February 21, 2005. The director found that as the Form I-140 petition was filed on July 17, 2006, a period in excess of 180 days had elapsed from the last day of the posting notice prior to filing the visa petition. On appeal, counsel states that the 2005 dates were in error, and that the notice was actually posted in 2006 between 30 and 180 days before filing the application. In support of counsel's assertions, the record includes a statement from [REDACTED], Recruitment Coordinator for the petitioner, stating that the actual posting period was from February 6, 2006 to February 21, 2006 and that she mistakenly wrote 2005 on the notice. Counsel also points out that the notice with the February 6, 2005 to February 21, 2005 dates was faxed to counsel on April 13, 2006 which identified the time frame the document was handled by the petitioner. The AAO notes that there is a fax date printed on the top of the notice dated April 13, 2006.

If the notice actually was posted for only those dates shown on the initial notice, the petition would not be eligible for Schedule-A processing at the time of filing, which would compel the director to deny the petition. If, on the other hand, the record contains conflicting information that a petitioner can resolve with competent and objective evidence, the petitioner may demonstrate that it met the requirements for Schedule-A processing at the time of filing. See *Matter of Ho*, 19 I&N Dec. 582, 591-2 (BIA 1988). In this case, the petitioner is asserting that it actually did post the notice between 30 and 180 days before filing the application, and the 2005 date written on the notice was a simple error. Given the statement submitted by [REDACTED] acknowledging her mistake along with the fax date of April 13, 2006 printed on the top of the notice, the AAO finds the petitioner had properly posted the notice prior to filing the instant petition, despite the fact that the petitioner misdated the notice posting dates.³

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 met that burden.

ORDER: The appeal is sustained.

³ We note that had the petitioner posted an incorrect notice, either by content or the duration of posting, the petitioner would not be eligible for the benefit sought. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (*Reg. Com.* 1971.); see also section 122(b)(1) of the Immigration Act of 1990 (Public Law 101-649).