U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 17 2004

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IN RE: Petitioner: [redacted]
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:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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, Director
Administrative Appeals Office

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

The petitioner is a hospital. It seeks to permanently employ the beneficiary in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The director determined that the petitioner had not submitted a properly filed application for labor certification along with the petition. Specifically, the petitioner did not establish that it had complied with the regulatory requirements governing the posting of the notice of the position offered at the time the petition was submitted.

On appeal, counsel submits a brief and additional evidence.

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

The sole issue in this case is whether the notice of filing meets the regulatory requirements for posting as stipulated by the regulations. It is noted that the beneficiary has been employed in this position since March of 2002.

With the petition, filed on November 7, 2002, the petitioner failed to submit any evidence of its notice of filing. Therefore, on January 28, 2003, the director requested evidence as to where the notice was posted and the dates that it was posted.

In response, the petitioner submitted a copy of the notice of filing showing that it was posted at Detroit Receiving Hospital from November 1, 2002 through November 15, 2002.

On April 3, 2003, the director denied the petition noting that the notice of filing had not been posted for ten consecutive days prior to the filing of the petition as required by the regulations at 20 C.F.R. § 626.20(g).

On appeal, counsel states:

> There is no statute, rule, or regulation that requires an employer to post a Notice of Filing for ten (10) consecutive days prior to the filing of a Form I-140 for a Schedule A position. The only requirement is that the Notice of Filing be posted for ten (10) consecutive days. This was done in this case.

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 which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of Labor's Labor Market Information Pilot Program 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).

The regulations set forth in Title 20 of the Code of Federal Regulations also provide specific guidance relevant to the contents and procedure required to properly post a notice of an Application for Alien Employment Certification and job opportunity for a registered nurse. 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. It must also include evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or the employer's employees as set forth in 20 C.F.R. § 656.20(g)(3). 20 C.F.R. § 656.22(a) and (b).

In applications filed under §§ (Basic Process), 656.21a (Special Handling) and 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:

> 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 locations(s) in the area of intended employment.
>
> 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 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, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 C.F.R. §516.4 or occupational safety and health notices required by 20 C.F.R. § 1903.2(a).

The regulation at 20 C.F.R. § 656.20(g)(8) specifies that the requirements of the contents of the notice posted under the Schedule A procedures must include a description of the job and rate of pay, as well as satisfy the requirements set forth at 20 C.F.R. § 656.20(g)(3)(ii) and (iii). Those provisions require that the notice of filing shall "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 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 immigrant visa petition was filed on November 7, 2002. The Form ETA 750-A accompanying the petition establishes that the position of registered nurse pays $29 per hour. The Notice of Filing was posted November 1, 2002 through November 15, 2002.

In spite of counsel's contention that the purpose of the posting "is not to enable U.S. workers to bid on a job" but "to give a U.S. worker the opportunity to file a wage complaint if he/she feels the wage is too low," the purpose of requiring employers to post a notice of a 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.[1] In addition, a petitioner must establish that the petition was approvable at the time it was filed. A petition cannot be approved at a later date after a petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). The regulations require that the notice of filing be posted for ten consecutive days. Since the notice had not been posted for the required ten days prior to the filing of the petition, the petition was not approvable at the time it was filed.

ORDER: The appeal is dismissed.

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[1] See the Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); See also Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,344 (July 15, 1991).