U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 20 2007
WAC 05 20454907

IN RE: Petitioner:
Beneficiary: [redacted]

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]

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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is an acute care hospital. It seeks to employ the beneficiary permanently 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. § 656.5, Schedule A, Group I.[1] As required by statute, a Form 9089 Application for Permanent Employment Certification accompanied the petition. The director determined that the evidence submitted does not demonstrate that notice of filing the Application for Alien Certification was provided to the petitioner's employees or their bargaining representative as prescribed in 20 C.F.R. § 656.10(d) and did not, therefore, demonstrate that the instant petition is qualified for treatment under Schedule A as the petitioner claimed.

The record shows that the appeal was properly and timely filed. 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 the proffered position in this case is qualified for Schedule A treatment.

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.

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 skilled worker (registered nurse). Aliens who will be employed as registered nurses are listed on Schedule A. Schedule A is a list of occupations found at 20 C.F.R. § 656.5. The Director of the United States Employment Service has determined that an insufficient number of United States workers are able, willing, qualified, and available to fill the positions available in those occupations, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

The regulation at 20 C.F.R. § 656.15 states that an employer must apply for a labor certification for a Schedule A occupation by filing an application in duplicate with the appropriate DHS (Department of Homeland Security) office that will include:

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[1] If the petitioner were not claiming eligibility pursuant to Schedule A it could have, in the alternative, provided a Form 9089 Application for Permanent Employment Certification approved by the Department of Labor. In the instant case, as the record does not include such an approved labor certification, the petitioner must show that the proffered position is amenable to treatment pursuant to Schedule A.

> Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.10(d).

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 (Sheepherders) 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:
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> (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 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).

Although the regulations previously stated the required length of posting as "ten consecutive days," that requirement was recently revised to "10 consecutive business days." The revised regulation became effective on March 28, 2005. The petition in this matter was filed on July 1, 2005, 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 regulation at 20 C.F.R. § 656.10(d)(3) states,

> 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 local 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 regulation at 656.10(d)(6) provides that if an application is filed under the Schedule A procedures at § 656.15 of this part, "the notice must contain a description of the job and rate of pay, and must meet the requirements of this section.

The regulation at 20 C.F.R. § 656.15 states that an employer must apply for a labor certification for a Schedule A occupation by filing an application in duplicate with the appropriate DHS (Department of Homeland Security) office that will include:

> Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.10(d).

With the petition counsel submitted a notice of the proffered position. The notice describes the proffered position in accordance with the requirements in the regulations. A certification at the bottom of that notice indicates that it was posted from June 1, 2005 to June 13, 2005. The notice is a form with spaces for information to be added. A checkbox indicates that the form was posted, " . . . in a conspicuous location(s) in the workplace, where the [petitioner's] U.S. workers can readily read the posted notice." A space labeled "Specific Location(s) Posted" was not filled in.

The director denied the petition on October 26, 2005, finding that the evidence did not demonstrate that the position was posted between 30 and 180 days before filing the application as required by 20 C.F.R. § 656.10(d)(3)(iv). The director also stated that any subsequent effort to correct the notice of posting would constitute a material change to the petition and would be ineffective pursuant to *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971) and *In re Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm., Examinations 1998).

On appeal, counsel submitted eight posting notices of the proffered position. Those notices show that they were posted during May, June, July, August, September, October, November, and December of 2005. They state that they were posted at the "Human Resources Office, and [on the] bulletin board in main lobby behind [the] elevators where all employees clock in." This office notes that the May notice indicates that it was posted from May 2, 2005 to May 31, 2005, which is within the time period required by 20 C.F.R. § 656.10(d)(3)(iv).

Counsel asserted that the evidence demonstrates that the notice was posted during the period mandated by 20 C.F.R. § 656.10(d)(3)(iv). Actually, counsel asserts that the notice was posted multiple times during the permissible period. The permissible period is 30 to 180 days prior to submission of the visa petition. The petition in the instant case was filed on July 1, 2005. The period during which the notice must have been posted, therefore, is from March 3, 2005 to June 1, 2005. This office concurs that the May 2005 notice was posted within that period, but does not find that any of the other notices submitted on appeal purport to have been posted then.

The regulation at 8 C.F.R. § 103.2(b)(12) states, in pertinent part:

> An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. (Emphasis supplied).

The director was correct that no action could be taken by the petitioner after filing the visa petition in this case to make a late posting conform to the requirements of 20 C.F.R. § 656.10(d)(3)(iv). The evidence provided, however, is an attempt to show that the petition was posted in accordance with that section, but that insufficient evidence of that fact was presented with the petition. The petitioner and counsel were entitled to submit such additional evidence of a conforming posting on appeal.

A review of the posting notice upon which the petitioner initially sought to rely shows that it was posted on June 1, 2005, which date was within the permissible period. The remaining dates of the posting, however, were after the allowable period. For this reason the posting notice originally submitted does not demonstrate that the posting took place within the allowable period and cannot, therefore, be used to show compliance with 20 C.F.R. § 656.10(d)(3)(iv).

Further, that notice was not posted for ten consecutive business days as required by 20 C.F.R. 656.10(d)(1)(ii). The notice states that it was posted on June 1, 2005. The tenth business day, including the day it was posted, was June 14, 2005. The notice indicates that it was removed on June 13, 2005. The petition should have been denied for this additional reason.

However, the May 2005 posting notice, submitted on appeal, was posted in excess of 10 consecutive business days. Further, as was noted above, it was posted within the period 30 or more days and 180 or less days before the visa petition was filed.[2] That posting notice, if found credible, satisfies the requirements of both 20 C.F.R. 656.10(d)(1)(ii) and 20 C.F.R. § 656.10(d)(3)(iv), and all other relevant requirements, and this office sees no reason to doubt the veracity of the attestation pertinent to the dates during which it was posted.

The petitioner has overcome the sole basis of denial and this office finds no other reason to deny the petition. The appeal will be sustained and the petition will be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.

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[2] Although the entire period during which that notice was posted, May 2, 2005 to May 31, 2005, was within the allowable period, showing that any ten consecutive business days fell within that period would have been sufficient.