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U.S. Citizenship and Immigration Services

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[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 01 2007

LIN-05-161-51482

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]

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, Nebraska Service Center ("director"), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office ("AAO") on appeal. The appeal will be dismissed.

The petitioner operates a long term care facility, and seeks to employ the beneficiary permanently in the United States as a registered nurse, a professional or skilled worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1153(b)(3).

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b). *See also* 8 C.F.R. § 204.5(l)(3)(ii). For the beneficiary to qualify, the petitioner must show that it has the ability to pay the beneficiary the proffered wage, and that the beneficiary meets the qualifications set forth in the certified labor certification. *See* 8 C.F.R. § 204.5(g)(2).

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the Department of Labor ("DOL") has determined that there are not sufficient United States 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 United States workers similarly employed.

Based on 8 C.F.R. § 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file Form I-140, "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."[1] 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).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced 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). Also, according to 20 C.F.R. § 656.15, aliens who will be permanently employed as professional nurses must have: (1) passed the Commission on Graduates of Foreign Nursing Schools ("CGFNS") Examination, or (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment, or that the alien has passed the National Council Licensure Examination for Registered Nurses ("NCLEX-RN").

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[1] On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program ("PERM"), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

Additionally, the petitioner must demonstrate its ability to pay the proffered wage. The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner submitted the Application for Alien Employment Certification, Form ETA-750,[2] with the I-140 Immigrant Petition with the I-140 Immigrant Petition on April 29, 2005, which is the priority date. In response to the director's Request for Evidence ("RFE"), counsel provided two original Forms ETA 9089, as required after March 28, 2005 for filing under the new PERM regulations. The proffered wage as stated on Form ETA 9089 for the position of a nurse is $28.75 per hour, 40 hours per week, which equates to an annual salary of $59,800. On the I-140 petition filed, the petitioner listed the following information: established: January 15, 1896; gross annual income: $40.3 million; net annual income: $13.8 million; and current number of employees: 780.

On June 30, 2005, the director issued an RFE for the petitioner to submit: Form ETA 9089 fully executed in duplicate; a valid prevailing wage determination issued by the state workforce agency ("SWA") having jurisdiction over the proposed area of employment; evidence that the position was properly posted for the required ten consecutive business day time period; and evidence that the position was posted in "any and all in-house media." The petitioner responded.

On November 15, 2005, the director denied the petition on the basis that the petitioner failed to properly post the position in accordance with 20 CFR § 656.10(d)(1). Additionally, the petitioner failed to provide an attestation that the employer posted the position in any in house media, as required by 20 CFR § 656.10(d)(1)(ii), and failed to obtain a SWA wage determination prior to filing in accordance with 20 CFR § 656.40. Accordingly, the petition did not qualify for Schedule A certification, and was denied. The petitioner appealed and the matter is now before the AAO.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[3].

The record shows that the appeal is properly filed, timely and makes an allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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[2] The petitioner initially and improperly submitted Form ETA 750, which had been replaced with the Application for Permanent Employment Certification, ETA 9089, effective March 28, 2005.

[3] 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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On appeal, counsel provides that the petition was filed "about a month after PERM was introduced [and] there was general confusion about the process." Further, counsel states that in lieu of a "separate, stand alone attestation" that he submitted the petitioner's postings for multiple positions. Counsel additionally provides that the SWA prevailing wage was "inadvertently left out. Also, a mix up resulted in submitting a posting for a yet to be filed petition instead of the instant petition." On appeal, counsel submitted a posting notice, an employer attestation regarding in-house posting, and a copy of the SWA prevailing wage.

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

One of the requirements to meet Schedule A eligibility is that the petitioner is required to post the position in accordance with 20 C.F.R. § 656.10(d), which provides:

> (1) In applications filed under § 656.15 (Schedule A), § 656.16 (Sheepherders), § 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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> . . .
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> (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 . . . 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.
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> . . .
>
> (3) The notice of the filing of an Application for Permanent Employment Certification shall:
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> (i) 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;
> (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.
> . . .

> (6) If an application is filed under the Schedule A procedures at § 656.15. . . the notice must contain a description of the job and rate of pay and meet the requirements of this section.

Additionally, Section 212 (a)(5)(A)(i) of the Act states the following:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified . . . that
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> (I) **there are not sufficient workers who are able, willing, qualified . . .** and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

Fundamental to these provisions is the need to ensure that there are no qualified U.S. workers available for the position prior to filing. The required posting notice seeks to allow any person with evidence related to the application to notify the appropriate DOL officer prior to petition filing. *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. 32,244 (July 15, 1991).

To be eligible for a Schedule A petition, as set forth above the petitioner would need to have posted the position pursuant to 20 CFR § 656.10(d)(3)(iv) 30 to 180 days prior to the April 29, 2005 filing, and have met the other requirements of 20 CFR § 656.10(d).

In response to the RFE, counsel submitted a posting, exhibiting that the position was posted from May 31, 2005 to June 10, 2005 for "10 consecutive calendar days." The notice listed the job title, and position duties, as required, but failed to post the notice prior to filing, failed to list the certifying officer's address, and failed to post for the required 10 consecutive business days. Accordingly, the posting notice was deficient and not in accordance with 20 C.F.R. § 656.10(d)(1)(ii), 20 C.F.R. § 656.10(d)(1)(ii)(3)(iii), and 20 C.F.R. § 656.10(d)(1)(ii)(3)(iv). Counsel additionally submitted a number of "in-house postings" for the petitioner, which listed position titles, work locations, and human resource contact information and were dated June 24, 2005, July 8, 2005, July 15, 2005, July 22, 2005, July 29, 2005, August 5, 2005, August 12, 2005, August 19, 2005, August 26, 2005, September 9, 2005, and September 16, 2005. All of the in-house postings submitted were completed after filing, and thus not in accordance with 20 C.F.R. § 656.10(d)(1)(ii).

On appeal, counsel provides a posting notice, which lists that the petitioner posted the notice from February 1, 2005 to February 11, 2005 for "10 consecutive calendar days." Based on the time of filing the petition, the petitioner would be required under the PERM regulations to post the notice for 10 consecutive business days, rather than 10 consecutive calendar days. The posting notice submitted was posted for only 9 consecutive business days, and not the required 10 days. *See* 20 C.F.R. § 656.10(d)(1)(ii). The notice fails to list the address for the certifying officer in accordance with 20 C.F.R. § 656.10(d)(1)(ii)(3)(iii). The posting notice lists the position's hourly wage as $21.18, which is below the petitioner's offered wage to the beneficiary of $28.75, and below the prevailing wage set by the SWA of $21.67 per hour, and fails to meet 20 C.F.R. §

656.10(d)(1)(ii)(6). Accordingly, the posting notice submitted on appeal is deficient and fails to meet the requirements as set forth in 20 C.F.R. § 656.10.

Additionally, counsel submitted an attestation that the notice was posted "as part of the regular weekly in-house advertising, in a conspicuous place," and was simultaneously posted on the petitioner's website. Counsel again resubmitted the same documentation of in-house postings for various positions with the petitioner completed between June 17, 2005 and September 15, 2005, all of which were subsequent to the petition's filing and therefore not sufficient to meet the pre-filing requirement.

The regulation at 20 C.F.R. § 656.10(d)(1)(ii) provides that the "in-house" posting 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 application in accordance with the procedures used for similar positions within the employer's organization." The petitioner failed to provide a copy of the notice posted on the petitioner's website. Further, the in-house posting notices that counsel resubmitted were posted after the petition was filed. The documentation submitted to show attestation regarding in-house posting is still insufficient to meet the requirements of 20 C.F.R. § 656.10(d)(1)(ii).

Further, a petitioner is also required to obtain a prevailing wage determination from the relevant State Workforce Agency ("SWA") in compliance with 20 CFR § 656.40 prior to filing. The petitioner only submitted the prevailing wage request on appeal, and not with the initial filing. The petitioner's wage request shows that it was submitted to the Department of Employment and Economic Development, State of Minnesota, the relevant SWA, on July 7, 2005.[4] The Department of Employment and Economic Development made a determination on the wage request on July 15, 2005 and assessed a wage rate of $21.67. As the wage request was only submitted to the SWA after the petition was filed, the petition fails to comply with 20 CFR § 656.40.

Counsel additionally contends that denial of the petition would result in substantial harm to the beneficiary. Regarding harm to the beneficiary, as well as counsel's contention that the PERM process was new and "there was general confusion about the process," we note that substantial harm was not necessary. The PERM regulations were published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Based on the advance date of publication, counsel should have had ample opportunity to review the new filing requirements for a Schedule A position and to comply with those regulations. The Federal Register is a public document, which can easily be accessed online.

Based on the foregoing, the petitioner failed to meet the posting requirements as set forth in 20 C.F.R. § 656.10(d), and failed to obtain the prevailing wage prior to filing. Accordingly, the petitioner has failed to meet the regulatory requirements, which require that the posting notice be completed prior to filing the Schedule A application. 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, that burden has not been met.

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[4] Accordingly, the petition failed to meet Schedule A eligibility at the time of filing based on this aspect as well as the posting notice. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Further, the petitioner failed to initially submit a fully executed Form ETA 9089 in duplicate. The petitioner did provide a duplicate copy of the ETA 9089 in response to the RFE.

ORDER: The appeal is dismissed.