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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE LIN 07 023 53335 Office: NEBRASKA SERVICE CENTER Date: AUG 05 2008

IN RE: Petitioner: [redacted]
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:

SELF-REPRESENTED

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, 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 healthcare staffing company. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner[1] 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 an application for permanent employment certification for ten consecutive business days at the beneficiary's intended place of employment. Therefore, the director denied the petition.

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 November 7, 2006 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.

On October 31, 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.

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).

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[1] The AAO notes that the G-28, Notice of Entry of Appearance as Attorney or Representative, is signed by the petitioner's employee, [redacted] On the Form, [redacted] checked Box four and stated: [The petitioner] is representative of this beneficiary's immigration petition." Thus, the petitioner is self-represented.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. 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 or October 31, 2006. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is $835 a week, or $43,420 annually.[2]

The AAO takes a *de novo* look at issues raised in the denial of the petition. *See 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.[3] On appeal, the petitioner submits a letter and the following documents:

A copy of a document entitled "Posted Notice of Employment." The notice is signed by [redacted] and dated November 9, 2006. The notice states it is a worksite posting at Central Vermont Hospital, Fisher Road, Barre, Vermont, and further states that it is was posted in a conspicuous place for a period of ten consecutive business days or more, from September 1, 2006 to September 30, 2006. [redacted] further attests that the petitioner does not currently use any form of in-house media to publish or distribute the posting notice. And identifies the nurses' lounge-break room as the physical location within the facility. She also notes that although the attestation letter remains continuously posted, for each foreign nurse an individual ETA 9089 is posted prior to filing a petition to the INS for at least ten consecutive days.

A copy of another Posted Notice of Employment for the University of New Mexico Hospital, Albuquerque, New Mexico. This notice is signed by [redacted], and states the work site posting was from September 1, 2006 to September 30, 2006 [redacted] notes on a second page that the University of New Mexico does not currently use any form of in-house media to advertise positions and appears to state that the Posting Notice was located in the facility's staffing office.

The record also contains a copy of a document on the petitioner's letterhead entitled "Posted Notice of Employment" for the work site of the Central Vermont Hospital. This document indicates it was posted in a conspicuous place at the petitioner's office for a period of ten consecutive business days or more from September 4 to September 15, 2006. This letter appears to be signed by [redacted]. Finally, the record contains a document entitled "General Notice," with the petitioner's name on the top. The document contains a job order number, with job location identified as in the United States, and is dated September 2006. The document states that the notice was posted at worksites of all hospital locations where relevant workers are currently working. The document indicates the dates of September 4, 2006 to September 15, 2006 at the University of New Mexico and Central Vermont Hospital, and is signed by University of New Mexico and Central Vermont Hospital representatives as of October 30, 2006.

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[2] This proffered wage is based on information contained in the Form ETA 9089 submitted to the record for the original beneficiary, [redacted] The AAO will address more fully the lack of a Form ETA 9089 for the substituted beneficiary further in these proceedings. The petitioner also submitted a copy of an employment contract between itself and the substituted beneficiary that states an hourly rate of not less than $20 dollars an hour. *See* page 5 of employment contract.

[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). 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).

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 the petitioner's facility or the beneficiary's respective place of employment.

On appeal, the petitioner states that the two attestations submitted to the record on appeal are evidence that the petitioner's notice of employment was posted from September 1 to September 30, 2006, in the facilities of Central Vermont Hospital and the University of New Mexico, and these dates, excluding federal government holidays and weekend days, met the terms of 20 C.F.R. § 656.10 and 29 C.F.R. § 2510.3-102(e).[4]

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:
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> (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;
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> 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.

[4] The director in his decision referenced these two regulations that deal with the definition of business days.

The AAO views the record as presently constituted to contain conflicting evidence. The record reflects that the petitioner posted notice of filing an application for permanent employment certification at its facility from September 4, 2006 to September 15, 2006. As the director correctly stated, the regulation at 29 C.F.R. § 2510.3-120(e) defines a "business day" as "any day other than Saturday, Sunday or any other day designated as a holiday by the Federal Government." While this DOL regulation does not pertain to labor certifications, DOL clearly adopted this definition in relation to the ten day posting period. *See* www.foreignlaborcert.doleta.gov/faqsanswers.cfm, page 4 (accessed July 23, 2008).

This office notes that Monday, September 4, which fell within period of posting, was a Federal holiday, and that September 9 and September 10, 2006 were weekend days. Thus, the notice was posted for only nine consecutive business days.

On appeal, the petitioner submits documents that indicate the posting notices for both the University of New Mexico and Central Vermont Hospital were posted from September 1 to September 30, 2006. The posting notice for Central Vermont Hospital signed by [redacted], is dated November 9, 2006, and is dated ostensibly after the receipt of the director's decision dated November 7, 2006. The petitioner provides no explanation for the changed times of posting. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

Beyond the decision of the director, the AAO finds that the instant petition lacks other essential documentation that would automatically cause the denial of the petition. 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).

In the instant petition, the petitioner submitted a completed ETA Form 9089 for the original beneficiary, but submitted no ETA Form 9089 for the instant beneficiary. Thus, the AAO cannot determine the prevailing wage for the proffered position, the academic credentials and work experience of the beneficiary signed by the beneficiary, and whether the beneficiary's academic credentials are sufficient to meet the stipulated educational and work experience of the proffered position.[5] Although the AAO cannot identify any specific regulation that states petitioners must provide a new ETA Form 9089 for any substituted beneficiary, an interoffice memorandum written by [redacted] provides some guidance. [6]

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[5] In the instant petition, the petitioner would also have to clarify whether the partially legible copy of the beneficiary's certificate from the Kerala Nurses and Midwives Council for a three year and six month course at Sacred Heart Hospital, Puloor, India, is sufficient to meet the petitioner's minimum academic requirements.

[6] Memorandum from [redacted] Acting Associate Director, Domestic Operations Interim Guidance Regarding the Impact of the Department of Labor's (DOL) final rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, on Determining Labor Certification Validity and the Prohibition of Labor Certification Substitution Requests. HQ70/6.2 ADO7-20, June 1, 2007. On page nine, the memo states: "For

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, that burden has not been met. 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.

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individual labor certifications filed with the Department of Labor on or after March 28, 2005, a new Form ETA-9089 signed by the substituted alien must be included with the petition. Additionally a written notice of withdrawal of any pending or approved Form I-140 initially submitted for the original beneficiary or any previously substituted alien must be included, as well as a photocopy of the Form I-797 receipt and/or approval notice, if available." Although this section does not refer specifically to Schedule A petitions with accompanying Forms ETA 9089 that are filed directly with CIS, the guidance appears appropriate.