U.S. Department of Homeland Security
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Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 04 2009
LIN 07 025 50783

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The petitioner is a 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.

As set forth in the director's denial dated November 7, 2006, the issues in this case are whether or not the notice of filing the Application was provided between 30 and 180 days before filing the Application for Permanent Employment Certification (the Application) in accord with the regulation at 20 C.F.R. § 656.10(d)(3)(iv), and whether or not the posting notice listed the proper wage rate. The director found that the petitioner did not provide the notice of filing of the application in the required time frame prior to filing in accordance with the regulation at 20 C.F.R. § 656.10(d)(3)(iv). Accordingly, the director denied the petition.

The petitioner states on Form I-140 that it was established in March 2006. It employs 233 individuals.

On appeal, counsel submits a legal brief and additional evidence.

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.

The chronology of the filings and documentation in this matter are as follows: the petitioner posted notice of filing the Application for the required ten consecutive business days, that is beginning on September 20, 2006 and ending October 5, 2006; the petitioner obtained a Prevailing Wage Determination (PWD) from State Workforce Agency (SWA) dated September 25, 2006, stating a prevailing wage of $25.44 per hour for the offered job. The I-140 petition was accepted for filing on October 30, 2006. A receipt date is assigned upon the proper filing of the petition with the required filing fee. *See* 8 CFR §§ 103.2(a)(1)(d), and, 103.2(a)(7)(i).

In this case, the Form I-140 for classification of the beneficiary under section 203(b)(3)(A)(i) or (ii) of the Act as a registered nurse was accompanied by a Form ETA 9089[1] prepared by the petitioner and the beneficiary.

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[1] As a preface to the following discussion, new U.S. Department of Labor (DOL) labor certification regulations "PERM" became effective as of March 28, 2005. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). PERM applies to labor certification applications for the permanent employment of aliens filed on or after that date. The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. After March 28, 2005, the DOL Form ETA 750 was replaced by the

The regulation at 8 CFR § 204.5(d) states in pertinent part:

> Priority date ... 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 within 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 the Service ....

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.[2]

USCIS has the responsibility under regulation to review the blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. USCIS through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, and under PERM must investigate the facts in each case and determine if the material facts in the petition including the certification are true and correct. In this instance, the director conducts the review since in cases involving Schedule A occupations (i.e. registered nurse), USCIS is responsible to review compliance with applicable regulation. This process involves the investigation by USCIS of the petitioner's compliance with regulations promulgated under PERM as well as other relevant DOL regulations.

In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) or (ii) of the Act as a registered nurse on October 30, 2006. Aliens who will be permanently employed as professional nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.5 for which the Director of the United States Employment Service has determined there are not sufficient United States workers who are able, willing, qualified, and available for the occupations and 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.

An employer seeking a labor certification for an occupation listed on Schedule A may apply for that labor certification under the regulation at 20 C.F.R. §656.5, as follows:

ETA Form 9089, Application for Permanent Employment Certification. As the I-140 was filed on October 30, 2006, PERM regulations apply to this case.

[2] 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).

Schedule A

(a) Group I:

* * *

(2) Aliens who will be employed as professional nurses; and

(i) Who have received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS);
(ii) Who hold a permanent, full and unrestricted license to practice professional nursing[3] in the state of intended employment; or
(iii) Who have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application in duplicate with the appropriate USCIS office.

Pursuant to 20 C.F.R. § 656.15 applications for labor certification for Schedule A Occupations require the following:

(a) Filing application. An employer must apply for a labor certification for a Schedule A occupation by filing an application in duplicate with the appropriate DHS office, and not with an ETA application processing center.

(b) General documentation requirements. A Schedule A application must include:

(1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with Sec. 656.40 and Sec. 656.41.

[3] Under the regulations, 20 C.F.R. § 656.5(a)(3)(i), "professional nurse" means a person who applies the art and science of nursing which reflects comprehension of principles derived from the physical, biological and behavioral sciences. Professional nursing generally includes making clinical judgments involving the observation, care and counsel of persons requiring nursing care; administering of medicines and treatments prescribed by the physician or dentist; and participation in the activities for the promotion of health and prevention of illness in others. A program of study for professional nurses generally includes theory and practice in clinical areas such as obstetrics, surgery, pediatrics, psychiatry, and medicine.

(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 Sec. 656.10(d).

(c) Group I documentation. An employer seeking labor certification under Group I of Schedule A must file with DHS, as part of its labor certification application, documentary evidence of the following:

* * *

(2) An employer seeking a Schedule A labor certification for an alien to be employed as a professional nurse (Sec. 656.5(a)(2)) must file as part of its labor certification application documentation that the alien has received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); that the alien holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment; or that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). Application for certification of employment as a professional nurse may be made only under this Sec. 656.15(c) and not under Sec. 656.17.

With the petition counsel submitted the following relevant evidence: a DOL ETA Form 9089; an explanatory letter from counsel dated October 29, 2006; a support letter from the petitioner dated October 25, 2006; the notice of posting; a PWD dated September 25, 2006, from the State of Massachusetts, Division of Career Services - Prevailing Wage Unit for the position of registered nurse; a notice of filing the Application dated September 20, 2006; and the petitioner's 2005 annual report as well as documentary information concerning the beneficiary's qualifications.

The director denied the petition on November 7, 2006. Specifically the director found that notice of filing the Application was not provided between 30 and 180 days before filing the application in accord with the regulation at 20 C.F.R. § 656.10(d)(3)(iv); and the posted notice of filing the Application, listed a rate of pay of $23.22 per hour while the prevailing wage determination stated in that Application is $25.44 per hour. Therefore the director found the notice is contrary to the regulation at 20 C.F.R. § 656.10(d)(6).

Accompanying the appeal, counsel submitted a legal brief and the following documents: a letter from [redacted] of Human Resources for the petitioner dated December 5, 2006, with an attachment which is a USCIS memorandum entitled "Guidance for Schedule A Blanket Labor Certifications effective February 14, 2006;" and a USCIS interoffice memorandum HQPRD 70/23.12 dated September 12, 2006.

According to counsel, the director denied the petition because the USCIS/DOL rule defining "business day" to include weekdays only was established in violation of federal agency law, including the Administrative Procedures Act and constitutes arbitrary and capricious agency action/rulemaking.

The regulation at 20 C.F.R. § 656.10(d)(3)(iv) and DOL's "Timeline" Guidance.

The regulation at 20 C.F.R. § 656.10(d), entitled "Notice" states in pertinent part:

> (1) In applications filed under Sec. … 656.15 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 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 must be posted for at least 10 consecutive business days.* [emphasis added]. 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.
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> * * *
>
> (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;

(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]

Returning to counsel's assertion, in his brief counsel states, 'First, our argument centers on USCIS's and the Department of Labor's failure to properly promulgate a new substantive rule pursuant to the Administrative Procedures Act.'

This proceeding is not an action at law or a forum capable of providing relief for grievances under the Administrative Procedures Act but an administrative review proceeding regarding an employment based immigrant visa petition. Counsel has not offered any admissible evidence or case precedent authority that the "failure to properly promulgate a new substantive rule" may be raised in this case upon the issue of whether or not the petitioner failed to comply with the regulation at 20 C.F.R. § 656.10(d)(3)(iv). Counsel offers no relevant regulation or relevant case precedent to support his contention that "USCIS/DOL" violated "federal agency law" through the director's findings that the petitioner failed to comply with the regulation at 20 C.F.R. § 656.10(d)(3)(iv).

Further, the AAO is not a court of law and equity and it does not have plenary authority to render legal and equitable relief or to reform regulation. Counsel has not cited any relevant case precedent that the AAO may offer such relief.

Counsel then contends in his brief that 'Second, ... the requirement for an employer to provide notice of the filing of a labor certification [sic Application for Permanent Employment Certification] ... for "ten consecutive days' [and the] ... 'new rule requiring that the ten posting days be *weekdays* ... elevates form over substance.'

Counsel makes several other assertions and contentions concerning the posting of the notice to provide an explanation of this issue on appeal. Counsel contends that since the petitioner is open seven days each week that this fact implicitly exempts it from an application of plain reading of the regulation or that the regulation does not apply to the petitioner.

However, in this case the petitioner did post the Application for the required ten consecutive business days. The director did not deny the petitioner on this basis, so that counsel's arguments on this issue are not relevant. It is clear from counsel's contention that he has misunderstood the director's finding, which as restated here is that the notice of the petitioner's filing the Application was not provided between 30 and 180 days before filing the Application in accord with the regulation at 20 C.F.R. § 656.10(d)(3)(iv).

[4] Based upon a review of DOL's guidance concerning the PERM regulation found at its website http://www.foreignlaborcert.doleta.gov/faqanswers.cfm accessed on January 30, 2009, the window of opportunity called a "timeline" by DOL is calculated in calendar days rather than business days.

Since the I-140 petition in this matter was filed on October 30, 2006, the required interval for posting the notice of filing the Application was 30 to 180 days or between May 3, 2006 and September 30, 2006. The petitioner's posting notice extended past the September 30, 2006, timeline and would not allow an October 30 filing. Under DOL's "Time Period" guidance found at the above mentioned footnote "4," the first day of the event is counted. September 20, 2006, the first day of the posting, is counted as day-one. Day "ten" of ten consecutive business day time period would be October 3, 2006. The petitioner must then wait thirty calendar days to file the Form I-140. The petitioner would begin counting from the day after the posting period ended, with October 4 as the first day. As the petition was filed on October 30, 2006, the petitioner failed to allow the full 30 days period to elapse prior to filing.

Based upon our review of that portion of the director's decision relating to the regulation at 20 C.F.R. § 656.10(d)(3)(iv), the petitioner failed to allow 30 days to elapse from the end of the posting until filing of the Application with the petition filed with USCIS to employ the beneficiary permanently in the United States as a registered nurse. Therefore the notice of filing the Application was not provided between 30 and 180 days before filing the Application in accord with the regulation at 20 C.F.R. § 656.10(d)(3)(iv).

The regulation at 20 C.F.R. § 656.15, the Prevailing Wage Determination

Counsel contends on appeal that the director erred in denying the petition, he states that the employer's notice of filing provided all information necessary to calculate the actual wage for the position.

A Schedule A filing requires that the petitioner obtain a PWD from the appropriate state workforce agency. The PWD is valid for 90 days but not more than one-year. *See* 20 C.F.R. § 656.40.

Specifically, the regulation at 20 C.F.R. § 656.15 states that applications for labor certification for Schedule A Occupations require the following:

> (a) Filing application. An employer must apply for a labor certification for a Schedule A occupation by filing an application in duplicate with the appropriate DHS office, and not with an ETA application processing center.
>
> (b) General documentation requirements. A Schedule A application must include:
>
> * * *
>
> (3) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with Sec. 656.40 and Sec. 656.41.

The regulation at 20 C.F.R. § 656.10(d)(6),

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

The above mentioned PWD stated, *inter alia*, that the prevailing wage rate was *$25.44 per hour*, that the job title was "registered nurse," and that the PWD was valid until June 30, 2007. Thus, the petition listed the prevailing wage on Form ETA 9089 as $25.44.

However, the notice of posting of the Application found in the record, stated the rate of pay of *$23.22 per hour* base rate (with per-hour shift differential $4.00 for evenings, $1.50 for week-ends).

As justification for the petitioner offering less than the prevailing wage rate counsel asserts that the hospital is in compliance with the regulation as the petitioner has stated a base rate and shift differentials increases in the hourly rate based on the specific shift being worked.

The petitioner posted the notice of filing the Application beginning on September 20, 2006, *before* receiving a PWD from the SWA. The PWD was dated September 25, 2006. Despite counsel's assertions regarding shift differentials, the posting notice does not clearly alert potential workers to the accurate pay wage as is listed in the PWD.

As noted above, regulations require that the offered job be posted and notice given according to the wage stated in the PWD. The AAO finds that the notice of filing an application for permanent employment certification was posted at less than the prevailing wage contrary to the regulation. Further, the petitioner did not provide notice properly to allow 30 days to elapse prior to filing in accord with the regulation at 20 C.F.R. § 656.10(d)(3)(iv).

The petition will be denied for the above stated reasons. 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.