U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 16 2010

LIN 06 269 50244

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.

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).

Perry Rhew
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 health 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).

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(2), and 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 nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(3)(ii).

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 [U.S. Citizenship and Immigration Services (USCIS)]." 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).

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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).

Also, according to 20 C.F.R. § 656.15(c)(2), 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 (3) that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

On September 26, 2007, the director denied the petition because the petitioner failed to properly post the position in accordance with 20 C.F.R. § 656.10(d)(1). Specifically, the director found that the petitioner failed to post the notice for the requisite ten consecutive business days to allow proper notice to prospective U.S. workers.

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.[2]

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.

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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> (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,

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

> 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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> . . .
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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.
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> . . .
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> (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). Statutory

interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). We are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

The petitioner submitted a notice posted from July 1, 2006 to July 15, 2006. As the period of time between July 1, 2006 and July 15, 2006 included only nine consecutive business days and not the required ten (July 4 was a federal holiday and July 1, 2, 8, 9, and 15 were weekend days), the petitioner did not comply with the requirements of 20 C.F.R. § 656.10(d)(1)(ii) and this petition may not be approved.

With respect to the issue of whether the notice was posted for ten consecutive business days, on appeal, counsel asserts that a "business day" for a medical care facility is every day of the week, weekends and holidays included, so that the period of time that the notice was posted should include every day of the week instead of the traditional work week.

The definition of "business days" used by USCIS can be found on the DOL website in its "Frequently Asked Questions (FAQs)" section:

> **Time Periods** are the number of days during which an activity must take place. Examples of time periods are the requirement a job order must be placed for 30 days and the requirement that a Notice of Filing must be posted for ten consecutive business days. When counting a time period, both the start date and end date are included in the count. Thus, if a job order is on the State Workforce Agency web site from February 1, 2007, through March 8, 2007, February 1st, is day 1, February 2nd, is day 2, March 2nd, is day number 30, March 8th, is day number 36.
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> As another example, the regulation requires a Notice of Filing posting for a time period of ten consecutive business days. If the order is posted on Monday, April 30, 2007, Monday is day 1, Friday, May 4th, is day 5; the following Monday, May 7th, is day 6; and Friday, May 11th, is day 10. May 11th, is the last day of this time period and is therefore defined as the event and is not counted when calculating the 30 day restriction prior to filing timeline. To calculate the 30 day timeline, May 12th, is day 1, May 13th, day 2, May 23rd, day 12; May 31st, day 20; and June 10th, is day 30. The application can be filed on June 10, 2007.
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> Examples of the earliest filing date permissible for a particular Notice of Filing posting or job order placement date are as follows:
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> If the Notice of Filing is posted on Thursday, June 28, 2007, the posting dates must

> be June 28 – July 12, and the earliest filing date permissible is Saturday, August 11, 2007, (the notice of filing must be posted for "ten consecutive business days" and, therefore, neither weekends nor the Fourth of July are counted).
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> . . .

See http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#timeframes5 (accessed October 7, 2009). Under DOL's interpretation of 20 C.F.R. § 656.10(d) related to ten consecutive business days, holidays and weekend days cannot be counted in the calculation to meet the ten consecutive business days. As the time period that the notice was posted by the petitioner includes five weekend days and one holiday, the petitioner failed to demonstrate that it posted the notice for ten consecutive business days as defined by the DOL.

Counsel continues that the definition of "business day . . . dangerously compares a bank and a stock exchange to be in the same business as a healthcare facility." Counsel continues that "a nursing home institution remains open for business despite the holiday. As a matter of public policy, it would endanger the elderly population should a nursing home close for any holiday." Counsel's argument misconstrues the purpose of the regulation and attempts to impose an individualized definition for the terms involved instead of viewing the regulation as one which encompasses every industry and business. Although some medical care facilities may operate on a full-time basis, not taking time off for weekends or holidays, the regulations were written to cover all businesses, not just medical facilities as the 20 C.F.R. § 656.10 posting provisions also relate to the general labor certification process. In no way does the regulation suggest, as counsel argues, that any facility should modify its hours of operation. As such, the regulations must be applied consistently to applicants with no regard as to their individual operating procedures. In addition, the regulation is written broadly to provide adequate notice to U.S. workers so that the notice should be provided for "*at least* 10 consecutive business days." (Emphasis added). The petitioner has not argued that it would experience any prejudice or harm had the notice been left up longer and the purpose of the regulation would have been met for any period of time over ten consecutive business days.

On appeal, counsel provides the definition of "business day" from InvestorWords.com, Wikipedia.com,[3] BusinessDictionary.com, InvestorGlossary.com, and TotalReturnAnnuities.com.

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[3] We note that there are no assurances as to the reliability of information contained on Wikipedia as it is an open, user-edited internet site subject to the following disclaimer:

> *Wikipedia* is an online open-content collaborative encyclopedia, that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information. . . . *Wikipedia* cannot guarantee the validity of the information found here. The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.

These websites' definitions do not support counsel's position. For example, the definition of "business day" from InvestorWords.com states that it is "[t]he part of a day during which *most* businesses are operating, usually from 9 am to 5 pm Monday through Friday." (Emphasis added.) Counsel has provided no evidence that most businesses operate on a schedule like the petitioner's as opposed to the 9 am to 5 pm Monday through Friday specified by InvestorWords.com. Similarly, wikipedia.com states that "Saturdays and Sundays are not counted as business/working days" and that holidays must be "take[n] into account" and InvestorGlossary.com states that "[t]he business day is defined as any of the days Monday through Friday less holidays during which *most* businesses are in operation." None of these websites provides exceptions for certain types of businesses such as health care facilities or imposes an individualized definition of "business day" based on the type of business. Additionally, DOL's frequently asked questions defines how time frames should be counted to satisfy "business days." As such, the petitioner has failed to show that it posted the notice for at least ten consecutive business days.

In addition to its failure to post the notice for the required ten consecutive business days, although not raised by the director, the notice itself was deficient. Specifically, the notice fails to specify the education and experience required in compliance with 20 C.F.R. § 656.10(d)(6) (an associate's degree) and fails to state the address of the proper certifying officer in conformance with 20 C.F.R. § 656.10(d)(3)(iii). At the time of posting, for an offer in Illinois, the petitioner should have listed the Chicago National Processing Center at Railroad Retirement Board Building, 844 N. Rush Street, 12th floor, Chicago, IL 60611.[4] The posting additionally lists a wage of $26, which differs from the wage of $24 stated on the labor certification.[5] *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).

The petitioner failed to meet the posting requirements as set forth in 20 C.F.R. § 656.10(d). Accordingly, the petitioner has failed to meet the regulatory requirements, which require that the job notice be posted for at least ten consecutive business days.

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 not met that burden.

ORDER: The appeal is dismissed.

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[4] *See* FAQ Round 1 at http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_3-3-05.pdf (accessed October 9, 2009).

[5] Additionally, the record contains an agreement between the petitioner and the beneficiary which states that the petitioner will pay the beneficiary at a rate of $19 per hour. "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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).