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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: MAY 10 2010

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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 employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hospital. It seeks to permanently employ the beneficiary in the United States as a registered nurse. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1]

The petition contains a blanket labor certification application 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 U.S. 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 must file a Form I-140, Immigrant Petition for Alien Worker, accompanied by an application for Schedule A designation. The priority date of the petition is the date the petition is properly filed with U.S. Citizenship and Immigration Services (USCIS). 8 C.F.R. § 204.5(d).

The Schedule A application must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer's completion of an ETA Form 9089, Application for Permanent Employment Certification, and evidence that the employer has provided appropriate notice of filing the labor certification (Posting) to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d). The petitioner must also obtain a prevailing wage determination (PWD) in compliance with 20 C.F.R. § 656.40. Also, aliens who will be permanently employed as professional nurses must have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, hold a full and unrestricted license to practice professional nursing in the state of intended employment, or have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). 20 C.F.R. § 656.15(c)(2)

The instant petition was filed with USCIS on October 30, 2006. The director denied the petition on December 13, 2007. The decision states that the petitioner failed comply with the Posting requirements set forth at 20 C.F.R. § 656.10(d).

The record shows that the appeal is properly and timely filed. The procedural history in this case is

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[1]Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see also Janka v. U.S. Dept. of Transp.*, 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]

In order for the petition based on a Schedule A application to be approved, the petitioner must satisfy the Posting requirements set forth at 20 C.F.R. § 656.10(d). The regulation requires the petitioner to "give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided." 20 C.F.R. § 656.10(d)(1). In cases where there is no bargaining representative, this requirement is satisfied:

> 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.

20 C.F.R. § 656.10(d)(1)(ii). The regulations also require the employer to complete the Posting from 30 to 180 days prior to the filing of the petition. 20 C.F.R. § 656.10(d)(3)(iv).

The Posting in the record of proceeding states that it was posted from October 16, 2006 to October 27, 2006. Since the instant petition was filed on October 30, 2006, the Posting was not completed from 30 to 180 days prior to the filing, and the director denied the petition accordingly.

On appeal, counsel concedes that the Posting was not completed from 30 to 180 days prior to the filing of the petition as required by 20 C.F.R. § 656.10(d)(3)(iv). However, counsel argues that the Posting regulation is *ultra vires* and contests its validity. In support of this argument, counsel notes that Schedule A applications are for occupations which the DOL has determined do not require a test of the labor market. Counsel argues that "[b]ecause Schedule A occupations are pre-certified there is little purpose that this notice of filing could serve." Counsel also states that the regulation requiring the Posting to be completed 30 to 180 days prior to the petition filing "goes beyond the purpose of Schedule A [applications]," and "imposes a recruitment standard on a document that is manifestly not a recruitment tool."

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[2]The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

Counsel is correct that Schedule A occupations are designated by the DOL as shortage occupations, therefore no test of the labor market is required for the Schedule A application process. In the overview of its PERM regulation, the DOL states that the primary purpose of the Posting requirement is "to provide a way for interested parties to submit documentary evidence bearing on the application for certification rather than to provide another way to recruit for U.S. workers." 69 Fed. Reg. 77326, 77338 (Dec. 27, 2004). Although the DOL regulations impose the same time constraints on completing the Posting requirement as it does for most of the recruitment steps required for the standard PERM labor certification process, this does not appear to in any way undermine the validity of the Posting regulation. While counsel questions the utility of the timing requirement for Postings, his arguments are not persuasive that 20 C.F.R. § 656.10(d) is *ultra vires* or otherwise invalid. That being said, it must be emphasized that the AAO lacks authority to invalidate a regulation and could not grant the relief requested even if counsel's arguments were persuasive.

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 USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

For the reasons set forth above, the petitioner failed to submit a Posting that would permit an approval of the instant petition and accompanying Schedule A application.

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.