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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

B6

[redacted]

NOV 23 2010

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 healthcare 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 [United States Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d). Here, the petitioner submitted Form I-140 on October 31, 2006.

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 December 28, 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 noted that the petitioner did not 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 AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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.

On appeal, counsel asserts that the position was properly posted in accordance with 20 C.F.R. § 656.10(d)(1). Counsel stated that the petitioner's statement in response to the director's request for evidence (RFE) mischaracterized the petitioner's website as in-house media, and that the website is not considered in-house media as referenced in 20 C.F.R. § 656.10(d)(ii).

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).

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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> . . .

[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).

(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.

. . .

(3) The notice of the filing of an Application for Permanent Employment Certification shall:

(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

(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 and complied with the in-house media requirement pursuant to 20 C.F.R. § 656.10(d)(3)(iv) 30 to 180 days prior to the October 31, 2006 filing, and have met the other requirements of 20 C.F.R. § 656.10(d). The first posting notice shows that the notice was posted from August 3, 2006 until August 17, 2006. The director requested evidence that the petitioner posted the notice of filing in its in-house media. The petitioner stated in its response to the director's RFE that the notice was not published on its internal electronic posting. The petitioner stated that ". . . the employer did not meet the 'in-house media' requirement for posting prior to the filing of the I-140 petition . . ." In response to the RFE, the petitioner then posted and submitted a second notice dated from August 24, 2007, until September 10, 2007, stating that the notice was posted on the Human Resources bulletin board and on the petitioner's website/Internet. As previously noted, the director denied the petition finding that the petitioner had not properly posted the position pursuant to 20 C.F.R. § 656.10(d)(1)(ii) as the petitioner had not published 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.

As noted, in response to the director's request for evidence, prior counsel[3] for the petitioner stated that the "posting was not published on the employer's internal electronic posting. In other words, the employer did not meet the "in-house media" requirement for posting prior to the filing of the [Form] I-140 petition in this case." On appeal, counsel retracts this statement and submits an affidavit from the petitioner's [redacted]. [redacted] states that the normal process for recruiting nurses for the petitioner is through the Human Resources department in addition to the hospital website [redacted] All positions are posted on the website. Prospective employees can complete an application by either an on-line format or handwritten application submitted to Human Resources. In addition to the petitioner's website, employees or potential applicants can also review all available openings which are posted outside of the Human Resources Department. She further states that University Medical Center began using on-line applications in 2001 and that for the time period between March 30 and September 30, 2006, the petitioner used the same recruitment methods. Counsel states that the petitioner's website is not generally used for publishing and distributing job openings to company employees, and the website generally should

[3] New counsel took over the petitioner's representation on appeal.

not be considered as in-house media. From [redacted] statement, it is unclear whether posting positions on the petitioner's Intranet is part of the petitioner's normal hiring practice.

Upon review of the petitioner's website (accessed September 14, 2010), the AAO agrees that the information contained on the website is not the type of information that would generally be distributed for internal use. The website not only contains information about all available employment opportunities with the petitioner, which can be applied for by the general public on-line, but other information about the petitioner's operations, mission and services. In-house media does not generally include company websites or Internet based employment services. The applicable regulation is referring to any form of electronic or print media that is published and distributed within the company itself, such as newsletters, Intranets, etc, specifically for the benefit of company employees. *See* 20 C.F.R. § 656.10(d)(1)(ii).

On appeal, counsel resubmits its second posting notice, dated August 24, 2007 to September 10, 2007. The subsequent posting notice submitted sent to address the in-house posting states that it was posted in Human Resources, on the petitioner's website and on the [redacted] Therefore, the petitioner had the means to post the position in its in-house media, but as the RFE response acknowledges, it did not.

It must now be determined whether the notice of the filing of the Application for Permanent Employment Certification met all requirements of 20 C.F.R. § 656.10(d). The posting notice in this instance posted by the petitioner from August 3, 2006 to August 17, 2006 does not meet the regulatory requirements as the petitioner failed to post it in its in-house media prior to filing in accordance with 20 C.F.R. § 656.10(d)(1)(ii). Additionally, we note that the posting fails to mention a description of the job requirements to include the relevant education for the position. *See* 20 C.F.R. § 656.10(d)(3)(6).

The second posting notice submitted was posted between August 24, 2007 and September 10, 2007 and therefore does not comply with 20 C.F.R. § 656.10(d)(3)(iv) that the notice and in-house media posting be provided at least 30 days prior to filing. 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). Additionally, the second posting also fails to state the educational requirements and list the certifying officer's address in conformance with 20 C.F.R. § 656.10(d)(3)(iii). Therefore, the petitioner has failed to submit a proper notice of filing to comply with all the requirements of 20 C.F.R. § 656.10(d).

In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. The regulation further provides further provides: "In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establish the prospective employer's ability to pay the proffered wage." We note that the petitioner submitted a statement that it employs over 2,700 people and that it can pay the proffered wage. This statement was signed by a "nurse recruiter." In any further filings any such statements should be submitted by a financial officer in accordance with the regulations.

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.