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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B6

Date: JUL 17 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, Texas 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 hospital, and seeks to employ the beneficiary permanently in the United States as a staff 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 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 United States 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 filed the Form I-140 on July 31, 2007. The petitioner stated an hourly wage rate of $21.25 on ETA Form 9089.[2]

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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).

[2] The petitioner did not fully complete ETA Form 9089, Section F. related to the Prevailing Wage. Items 7 and 8 of this section, the wage determination date, and the wage expiration date, were both left blank.

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). Also, according to 20 C.F.R. § 656.5(a)(2), aliens who will be permanently employed as professional nurses must (1) have received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS), (2) hold a permanent, full and unrestricted license to practice professional nursing in the state of intended employment, or (3) have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing.

On February 9, 2009, the director denied the petition because the petitioner failed to submit a valid prevailing wage determination in accordance with 20 C.F.R. § 656.40.

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.[3]

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.

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 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'r 1988).

In the instant case, the petitioner failed to obtain a prevailing wage determination (PWD) in compliance with 20 C.F.R. § 656.40 from the relevant State Workforce Agency (SWA) prior to filing. The regulation at 20 C.F.R. § 656.40 specifically sets forth that the petitioner must request a wage and the wage obtained is assigned a validity period. In order to use a prevailing wage determination (PWD), "employers must file their [Schedule A] applications or begin the recruitment required by §§ 656.17(e) or 656.21 within the validity period specified by the SWA." *See* 20 C.F.R. § 656.40(c). The petitioner must file ETA Form 9089 and Form I-140 with the prevailing wage determination issued by the SWA having jurisdiction over the proposed area of employment. *See* 20 C.F.R. § 656.15(b)(i). A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

In the instant case, the petitioner submits a PWD from the Georgia Department of Labor. The PWD

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

was determined on August 15, 2007, after the petitioner's July 31, 2007 filing, and the PWD indicates that this prevailing wage is valid for filing applications and attestations until June 30, 2007.[4] The record shows that the instant Schedule A application was filed on July 31, 2007. The PERM regulations expressly state that an employer must file its application within the validity period specified by the SWA. In the instant case, the petitioner filed its application prior to obtaining the PWD and thus, did not file its Schedule A application within the validity period specified by the Georgia Department of Labor. Therefore, the petitioner failed to comply with the regulatory requirements with respect to the PWD validity period.

The petitioner does not dispute that the PWD was expired at the time the petition was filed on July 31, 2007. Rather, on appeal, counsel asserts that as the PWD specified a June 30, 2007 expiration date that it must have been valid "(at a minimum) from April 1, 2007 to June 30, 2007 (90 days)." Even if the AAO accepted that reasoning, and it does not, the I-140 petition was later filed on July 31, 2007, and the PWD still would have been invalid at the time of filing. Additionally, 20 C.F.R. § 656.41(a) sets forth procedures for an employer to seek a review of a SWA's PWD. As the PWD was defective on its face, the regulations afford an employer an opportunity and procedure to appeal that determination from the SWA. Nothing shows in this matter that the petitioner sought to clarify the defective PWD with the SWA prior to submitting the wage.

On appeal, counsel asserts that 20 C.F.R. § 656.40(c) allows a petition to be filed with an expired prevailing wage determination if the recruitment in connection with the petition was completed during the validity period of the prevailing wage determination. This assertion is incorrect. As the offered position of Staff Nurse is on the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the United States 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, no recruitment is required for these positions. Therefore, with respect to Schedule A filings, 20 C.F.R. § 656.40(c) requires that the prevailing wage determination be valid at the time that the petition is filed. Here, the PWD was obtained after filing the I-140 petition.

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:

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[4] Although the prevailing wage determination form issued by the Georgia Department of Labor does not indicate the date of expiration of the determination, the letter from the Georgia Department of Labor submitted with the prevailing wage determination contains a stamp that indicates that the determination expires on June 30, 2007. The petitioner had listed an offered wage rate of $21.25 per hour. However, the Level 1 wage rate for a nurse in the Atlanta, Georgia area changed from $20.69 per hour to $21.32 as of July 1, 2007. http://www.flcdatacenter.com/OesQuickResults.aspx?code=29-1111&area=12060&year=8&source=1(accessed March 11, 2012). It is unclear why the SWA issued a wage starting with an expiration date of June 30, 2007 and did not instead issue a determination valid at the higher rate.

(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:

. . .

(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.

The requirement of 20 C.F.R. § 656.10(d) to post the position for Schedule A eligibility is not a form of recruitment. Rather, the posting is required to give notice of the filing of the Application for Permanent Employment Certification. As stated above, the DOL has already determined that there

are not sufficient United States workers who are able, willing, qualified and available for the position, and no recruitment is required.

Beyond the decision of the director, the AAO finds that the petition lacks evidence that the notice of job opportunity was posted at least 30 days prior to filing the petition, as required by 20 C.F.R. § 656.10(d)(3)(iv) or that it was posted in the petitioner's in-house media in accordance with 20 C.F.R. § 656.10(d)(1)(i). 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

As set forth above, the petitioner must have posted the notice pursuant to 20 C.F.R. § 656.10(d)(3)(iv) for 30 to 180 days prior to the July 31, 2007 filing. In the instant case, the posting notice indicates that the posting was removed on July 2, 2007.[5] The petitioner filed the petition less than 30 days later, on July 31, 2007.[6] Thus, the Notice of Filing was not posted in accordance with 656.10(d)(3)(iv).

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[5] The purpose of the notice requirement of 20 C.F.R. § 656.10(d)(1)(ii) can be fulfilled when an employer posts the notice for 10 consecutive days when employees are working at the worksite and are able to see the notice, even if those days are Saturdays, Sundays, or federal holidays. DOL's FAQ's state that: To establish that the employer may count weekends as consecutive work days, the employer must provide documentation which establishes that on those days: 1) its employees were working on the premises and engaged in normal business activity; 2) the worksite was open and available to its clients and/or customers, if applicable, as well as to its employees; and 3) its employees had access to the area where the Notice of Filing was posted. Conversely, if an employer is not open for business any day, including a weekday, these will not be counted as business days for purposes of complying with 20 C.F.R. § 656.10(d)(1)(ii). The record lacks evidence as to whether the petitioner could include weekend days as business days in its ten consecutive business day calculation. The petitioner must address this issue in any further filings.

[6] DOL's Frequently asked Questions state the following for calculating time periods.

> **Timelines** are the number of days prior to or after a required event. When counting a timeline, the day of the event is not counted, the next day is counted as one, and the last day is included in the count. Thus, when determining the required 30 day timeline prior to filing an application for a newspaper advertisement placed on Thursday, February 1, 2007, the Thursday is not counted because it is the day of the event. Friday, February 2nd, is counted as day 1 of the timeline; Saturday, February 3rd, is day 2; etc., up until Saturday, March 3rd, which is day number 30. The application can be filed on the 30th day after the event, Saturday, March 3rd, but not before.
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> **Time Periods** are the number of days during which an activity must take place. Examples of time periods are the requirement that a job order must be placed for 30 days and the requirement that a Notice of Filing must be posted for ten consecutive

The AAO also finds that the petition lacks evidence that the notice of posting was published in any and all in-house media, as required by 20 C.F.R. § 656.10(d). The regulation at 20 C.F.R. § 656.10(d) provides:

> (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 wage and hour notices required by 29 CFR

> business days which may include Saturdays, Sundays and Federal holidays where the place of business is open for business on those days. When counting a time period, both the start date and end date are included in the count. Thus, if a job order is posted from February 1, 2007, through March 8, 2007, February 1st, is counted as day 1; February 2nd, is day 2; March 2nd, is day 30; and March 8th, is day 36.
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> To determine the first date on which the application can be filed after posting a job order, the 30-day time period for the job posting and the 30-day prior to filing timeline must both be calculated. In the example we are using above, March 2nd, [not March 8th] is the last day of the 30 day time period for the job order placement and is considered the event day so it is not counted in the timeline. Rather, the counting of the filing timeline starts on March 3rd, which is counted as day 1; March 4th, is day 2; etc., up until April 1st, which is day 30, the earliest possible filing date for an application.
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> ....
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> As another example, the regulation requires the Notice of Filing to be posted for a time period of ten consecutive business days. Assume that a place of business is open for business Monday through Friday and is closed holidays. 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 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, is day 2; May 23rd, is day 12; May 31st, is day 20; and June 10th, is day 30. The application can be filed on June 10, 2007.

In the present case, as the posting was completed on July 2, 2007, the thirty day period prior to filing would be counted from July 3, 2007. August 1, 2007 would be day 30.

> 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 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.*

(Emphasis added).

20 C.F.R. § 656.10(d) does not define "in-house media" or what sources in-house media would comprise. The initial PERM regulation published at 69 Fed. Reg. 77326 provides only that the posting must be "published in any and all in-house media in accordance with the normal procedures used for the recruitment of other similar positions." 69 Fed. Reg. at 77338.

DOL's FAQ response "Round 10" provides that "the regulations require that the employer publish the notice internally using in-house media – whether electronic or print – in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question." *See* http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (accessed July 11, 2012). The FAQ response further provides that:

> The language should give sufficient notice to interested persons of the employer's having filed an application for permanent alien labor certification . . . it is not required to mirror, word for word, the physical posting . . . In every case, the Notice of Filing that is posted to the employer's in-house media must state the rate of pay and apprise the reader that any person may provide documentary evidence bearing on the application to the Certifying Officer.

DOL's FAQ response notes that the posting contemplates internal notification of the petitioner's employees rather than external notification to the public at large. Further, the posting requirement relates to the employer's "*normal procedures used for the recruitment of similar positions in the employer's organization.*" The Notice of Filing submitted does not contain any indication whether it was posted in any in-house media.

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.

ORDER: The appeal is dismissed.