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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

B6

PUBLIC COPY



FILE: [REDACTED]  
LIN 05 129 52097

Office: NEBRASKA SERVICE CENTER

Date: FEB 20 2007

IN RE: Petitioner: [REDACTED]  
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:



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.

Robert P. Wiemann, Director  
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 health services network. It seeks to employ the beneficiary permanently in the United States as a registered nurse.<sup>1</sup> The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. The director determined that the evidence submitted does not demonstrate that the notice of filing the Application for Alien Certification was made according to the regulation at 20 C.F.R. § 656.10(d).

Additionally, the director found that the petition as filed contained no documentary evidence that notice of filing was made in any in-house media (meaning within the petitioner's own organization) according to the regulation at 20 C.F.R. § 656.10(d)(1)(ii).

Further, the director found that the petition as filed contained no documentary evidence that notice of filing instructing interested parties to provide evidence on the application to the appropriate U.S. Department of Homeland Security office according to the regulation at 20 C.F.R. § 656.10(e)(2) was given.

Additionally, the director found that an Application for Permanent Employment Certification, U.S. Department of Labor, ETA 9089, or a prevailing wage determination ("PWD") from the appropriate state work force agency ("SWA") was not submitted with the petition as filed.

Accordingly, for the reasons stated above, the director denied the petition.

According to the petitioner, it is part of an integrated healthcare system established in 1906. As of 2005, the system employed 18,900 individuals.

On appeal, counsel submits an explanatory letter 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.

In this case, Form I-140 for classification of the beneficiary under section 203(b)(3)(A)(i) or (ii) of the Act as a professional or skilled worker (registered nurse) was accompanied by an uncertified Form ETA 750 prepared by the petitioner and the beneficiary. The petition was received on March 24, 2005, returned to the petitioner for attachment of the correct filing fee, and then accepted for filing on April 6, 2005. A receipt date is assigned upon the proper filing of the petition with the required filing fee. See 8 CFR §§ 103.2(a)(1), and, 103.2(a)(7)(i).

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

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<sup>1</sup> According to the records of Citizenship and Immigration Services (CIS), the petitioner has filed a second I-140 petition for the same beneficiary at CIS record number LIN 060 855 51218 that has since been approved.

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 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.<sup>2</sup>

As a preface to the following discussion, new U.S. Department of Labor (DOL) regulations concerning labor certifications went into effect on March 28, 2005. The new regulations of the Permanent Labor Certification Program are referred to by DOL by the abbreviation "PERM." *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and 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 ETA Form 9089, Application for Permanent Employment Certification<sup>3</sup>. As the I-140 was filed on April 6, 2005, PERM regulations apply to this case.

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 April 6, 2005. 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:

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);

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<sup>2</sup> 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).

<sup>3</sup> The record of proceeding contains both ETA Forms 750 and 9089.

- (ii) Who hold a permanent, full and unrestricted license to practice professional nursing<sup>4</sup> 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 for Permanent Employment Certification (Form ETA-9089 at Part A) in duplicate with the appropriate Citizenship and Immigration Services (CIS) 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.

(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

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<sup>4</sup> Under the regulations, 8 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.

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.

The director denied the petition on August 10, 2005. Counsel appealed the director's decision on August 30, 2005, and asserts, *inter alia*, that:

The I-140 petition was denied because of an erroneous ... [original emphasis] interpretation of "business day." No RFE<sup>5</sup> ... [request for evidence] or NOID ... [notice of intent to deny the petition] was issued to allow explanation on this issue.

Counsel asserts on appeal that if the director had issued a request for evidence or a similar notice on the subject of notice of filing the Application for Alien Certification (according to the regulation at 20 C.F.R. § 656.10(d)), then counsel could have provided "explanation on this issue." The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. There is no regulatory requirement for CIS to issue such a request. When petitions on their face, do or do not demonstrate eligibility for the preference visa classification sought, the director may review and act upon the petition as submitted. The regulation at 8 C.F.R. § 103.2(b)(8) provides that an application or petition may be denied if there is clear evidence of ineligibility, notwithstanding the lack of initial evidence. Clear ineligibility exists when an applicant or petitioner does not meet a basic statutory or regulatory requirement.

Counsel submits an explanatory letter dated August 29, 2005, and previously submitted evidence on appeal. Relevant evidence in the record accompanying the appeal includes copies of the following documents: the director's decision dated August 10, 2005; the notice of posting evidencing posting between February 23, 2005 to March 5, 2005; regulations of the U.S. Department of Labor found at 20 C.F.R. § 656.15, *et seq*; an e-mail dated April 5, 2005; a Notice of Receipt, Form I-797C; the director's request for evidence dated June 6, 2005; the petitioner's response dated June 16, 2005, to the request for evidence; a CIS Interoffice Memorandum (HQOPRD70/8.5) dated June 15, 2005; a redacted letter in another matter dated January 29, 1996, from the Office of General Counsel, U.S. Department of Justice, Immigration and Naturalization Service (USDOJ INS); a USDOJ INS letter dated June 26, 1997 made in response to an inquiry in another matter; page 77339 of the Federal Register, Volume 69, No. 247 (Monday, December 27, 2004) that concerns the PERM regulations; a CIS Interoffice Memorandum (HQOPRD70/2) dated February 16, 2005; regulations of the U.S. Department of Labor found at 20 C.F.R. § 656.10, page 171, and 20 C.F.R. § 656.15, page 172 of an unidentified publication; a printed page of a website found at <<http://tms.fairview.org> ...> accessed August 16, 2005; U.S. Department of Labor, ETA Form 9089, dated August 26, 2005 that does not utilize the filing date for a previously submitted USDOL Form ETA 750 by the petitioner for the beneficiary; a prevailing wage request made by the petitioner as determined on December 31, 2005 for the occupation "registered nurses" by the Department of Employment and Economic Development, Foreign Labor Certification, State of Minnesota; a letter from the petitioner dated August 26, 2006 stating that the loss of the services of the beneficiary in the petitioner's Intensive Care Unit would cause a hardship to the petitioner's operations; and, a support petition for the beneficiary signed by her co-workers and supervisors in support of the petition.

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<sup>5</sup> A request for evidence was made in this matter on June 6, 2005, but its subject matter was unrelated to the effect of the PERM regulations on the petition.

The regulation at 20 C.F.R. § 656.10(d)(1)(ii): The Posting Notice.

In the decision in this matter, the director determined that the evidence submitted by the petitioner does not demonstrate that the notice of filing the Application for Alien Certification was made according to the regulation at 20 C.F.R. § 656.10(d).<sup>6</sup>

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

(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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<sup>6</sup> The regulation at 20 C.F.R. § 656.10 General instructions in pertinent part:

(a) Filing of applications. A request for a labor certification on behalf of any alien who is required by the Act to be a beneficiary of a labor certification in order to obtain permanent resident status in the United States may be filed as follows:

(3) An employer seeking labor certification for an occupation listed on Schedule A must apply for a labor certification under this section and Sec. 656.15.

(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.

Some regulations require compliance with other regulations, as conditions precedent to be accomplished by the petitioner. These regulations may be viewed as conditions precedent in the determination of eligibility under the regulation at 8 C.F.R. § 103.2(b)(8). In this instance, the PERM regulations require the notice of filing of an application for labor certification be accomplished 30 to 180 days prior to the filing of the application (i.e. Application for Permanent Employment Certification, U.S. Department of Labor, ETA 9089).

According to the notice of posting found in the record of proceeding, notice of filing the application for Alien Employment Certification was provided from February 23, 2005 to March 5, 2005. The director found that the notice was posted for only eight consecutive business days. The director denied the petition on August 10, 2005 stating that there was no evidence that the petitioner posted the posting notice for ten consecutive business days according to PERM regulations.

The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that 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.<sup>7</sup>

Counsel makes several other assertions and contentions concerning this matter to provide an explanation on this issue on appeal. Chief among the assertions and contentions is counsel's assertion that there are no known CIS regulations that define the term "business day." In determining the respective jurisdictions of the Department of Labor and the CIS, one may turn to the entire body of recent court proceedings interpreting the interplay of the agencies and strictly confining the final determination made by the Department of Labor. *See Stewart Infra-Red Commissary, Etc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981); *Denver Tofu Company v. District Director, Etc.*, 525 F. Supp. 254 (D. Colo. 1981); and, *Joseph v. Landon*, 679 F.2d 113 (7th Cir. 1982). These cases recognize the labor certification process and the authority of the Department of Labor in this process stem from section 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A). In labor certification proceedings, the Secretary of Labor's determination is limited to analysis of the relevant job market conditions and the effect, which the grant of a visa would have on the employment situation. CIS, through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, must investigate the facts in each case and, after consultation with the Department of Labor, determine if the material facts in the petition including the certification are true and correct. The burden

<sup>7</sup> 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).

of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. This process involves the investigation by CIS of regulations promulgated under PERM as well as other relevant U.S. Department of Labor regulations.

The regulation at 29 C.F.R. § 2510.3-102(e) sets forth U.S. DOL's definition of "business day" as "any day other than a Saturday, Sunday or any day designated as a holiday by the Federal Government." A review of the discussion of changes made to the permanent labor certification application process from "Labor Certification for the Permanent Employment of Aliens in the United States: Implementation of New System" illustrates that the drafters of PERM changed the old requirement from "10 consecutive days" to "10 consecutive *business days*" to expand the notice requirement for petitioning entity's employers (emphasis added). See 69 Fed. Reg. 77326, 77339 (December 27, 2004). The regulations do not provide exemptions for entities whose business operations continue on weekends and holidays. Therefore, the director correctly interpreted the PERM regulation duration requirement for the posting notice. Thus, the AAO affirms the director's decision that the petitioner has failed to submit a regulatory-prescribed posting notice that conforms to the regulatory requirements for Schedule A, Group I nurse petitions. Clearly, as the director found, this deficiency cannot be overcome in the present, to cure what was not accomplished by the petitioner in the past.

Counsel also submits on appeal on the above posting and notice issue among other documents a CIS Interoffice Memorandum (HQOPRD70/8.5) dated June 15, 2005; a redacted letter concerning another matter dated January 29, 1996, from the Office of General Counsel, U.S. Department of Justice, Immigration and Naturalization Service (USDOJ INS); and, a USDOJ INS letter dated June 26, 1997 made in response to an inquiry in another matter.

At the outset, it is noted that private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); see also, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S. Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000). Moreover, the regulation at 20 C.F.R. § 656.10(d)(1)(ii), is clear in its language that "The notice must be posted for at least 10 consecutive business days." In the present case the uncontested evidence in this matter was that the notice was posted for only eight consecutive days. We note that counsel is not asserting that the petitioner could have retroactively corrected the deficiency found by the director, that is the defective posting. The AAO is bound to follow the regulation as written that requires notice of posting for ten, and not eight, consecutive business days.

The regulation at 20 C.F.R. § 656.10(d)(1)(ii): In-house media publication.

The director found that the petition as filed contained no documentary evidence that notice of filing was made in any in-house media (meaning within the petitioner's own organization) according to the regulation at 20 C.F.R. § 656.10(d)(1)(ii). In pertinent part, the regulation requires " ... 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 ...."

On appeal counsel submitted a copy of the petitioner's web page entitled "Requisition Form View" showing that the job was listed "in-house" in January and February 2005. Without more, we cannot accept this document as a job listing within the petitioner's organization. It is, on its face, not a notice listing to interested employees, a prospective job. Although the notice states the position was posted January, 11, 2005, that posting document or web page was not submitted into evidence. According to the "Requisition Form View" it is only a history of a job filled by the beneficiary on February 15, 2005.

Beyond the decision of the director, according to the notice of posting found in the record of proceeding, the notice of filing the application for Alien Employment Certification was provided from February 23, 2005 to March 5, 2005, *after* the job was filled. According to the field in the "Requisition Form View," the subject job *was already filled* by the petitioner on February 15, 2005. We accept the "Requisition Form View" as an admission against the petitioner's interest in this matter, and evidence of a *per se* violation of the regulation found at 20 C.F.R. § 656.10(d)(1)(ii).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *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); *see also 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 regulation at 20 C.F.R. § 656.10(e)(2); Reference to appropriate U.S. DHS office

The regulation at 20 C.F.R. § 656.10(e)(2) states in pertinent part "... (2)(i) Any person may submit to the appropriate DHS office documentary evidence of fraud or willful misrepresentation in a Schedule A application filed under Sec. 656.15 ...

The notice as submitted does not provide and it does not reference any U.S. Department of Homeland Security office. The petition as filed contained no documentary evidence that notice of filing instructing interested parties to provide evidence on the application to the appropriate U.S. Department of Homeland Security office according to the regulation at 20 C.F.R. § 656.10(e)(2) was given.

The regulations at 20 C.F.R. § 656.15 (b)(1) and 20 C.F.R. § 656.40; Form 9089 and PWD

Additionally, the director found that an Application for Permanent Employment Certification, U.S. Department of Labor, ETA 9089, or a prevailing wage determination from the appropriate SWA was not submitted with the petition as filed.

The regulation at 20 C.F.R. § 656.15 (b)(1) states in pertinent part:

\* \* \*

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.

\* \* \*

The regulation at 20 C.F.R. § 656.40 entitled "Determination of prevailing wage for labor certification purposes" states in pertinent part:

- (a) Application process. The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it

uses and return the form with its endorsement to the employer. Unless the employer chooses to appeal the SWA's prevailing wage determination under Sec. 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with an ETA application processing center and maintains the SWA PWD<sup>8</sup> in its files. The determination shall be submitted to an ETA application processing center in the event it is requested in the course of an audit.

(b) Determinations. The SWA determines the prevailing wage as follows:

(1) Except as provided in paragraphs (e) and (f) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms-length between the union and the employer, the wage rate set forth in the CBA agreement is considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it is considered the "prevailing wage" for labor certification purposes.

(2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraph (b)(3) of this section, of the wages of workers similarly employed in the area of intended employment. The wage component of the DOL Occupational Employment Statistics Survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey under paragraph (g) of this section.

(3) If the employer provides a survey acceptable under paragraph (g) of this section that provides a median and does not provide an arithmetic mean, the prevailing wage applicable to the employer's job opportunity shall be the median of the wages of workers similarly employed in the area of intended employment.

(4) The employer may utilize a current wage determination in the area under the Davis-Bacon Act, 40 U.S.C. 276a et seq., 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 et seq.

(c) Validity period. The SWA must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a SWA PWD, employers must file their applications or begin the recruitment required by Sec. Sec. [sic] 656.17(d) or 656.21 within the validity period specified by the SWA.

(d) Similarly employed. For purposes of this section, similarly employed means having substantially comparable jobs in the occupational category in the area of intended employment, except that, if a representative sample of workers in the

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<sup>8</sup> Prevailing wage determination (PWD) means the prevailing wage provided by the State Workforce Agency.

occupational category can not be obtained in the area of intended employment, similarly employed means:

- (1) Having jobs requiring a substantially similar level of skills within the area of intended employment; or
- (2) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

On appeal, counsel provides in support of the petition two signed USDOL Forms ETA 9089 dated August 26, 2005, and, a prevailing wage determination issued by the State of Minnesota, Department of Employment and Economic Development, Foreign Labor Certification issued August 22, 2005. The preference visa I-140 petition was accepted for filing on April 6, 2005. As that is the priority date of the petition, the petition must comply with the PERM regulations provided within this discussion on that date. The petitioner cannot retroactively cure a defective petition by production of subsequently produced documents such as are offered here.

Of the above mentioned deficiencies, the most egregious<sup>9</sup> is that the petitioner failed to inform the CIS certifying officer that the subject job was already filled by the petitioner with the beneficiary on February 15, 2005, *before* the notice of filing the application for Alien Employment Certification was provided from February 23, 2005 to March 5, 2005. Such conduct precluded all other interested job applicants. Notwithstanding anything else discussed here, the job offer was *per se* not *bona fide* according to the regulation at 20 C.F.R. § 656.3, et seq.

We find that the evidence submitted does not demonstrate that the petition as filed contained documentary evidence that a notice of filing was made in any in-house media according to the regulation at 20 C.F.R. § 656.10(d)(1)(ii); that the petition as filed contained documentary evidence that notice of filing instructing interested parties to provide evidence on the application to the appropriate U.S. Department of Homeland Security office according to the regulation at 20 C.F.R. § 656.10(e)(2) was given; or, that that an Application for Permanent Employment Certification, U.S. Department of Labor, ETA 9089, or a prevailing wage determination from the appropriate SWA was submitted with the petition as filed.

Further, we find that the notice of filing the Application for Alien Certification was not made according to the regulation at 20 C.F.R. § 656.10(d).

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.

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<sup>9</sup> Reviewing the evidence as submitted, the petitioner failed to follow the foreign labor recruitment regulations in this matter. The petitioner failed to disclose to the CIS certifying officer that the job reputedly offered was in fact already given to the alien. The petitioner has the burden when asked to show that a *bona fide* job opportunity is available to U.S. workers. The regulation at 20 C.F.R. § 656.3, et seq., states that a "Job opportunity means a job opening for employment at a place in the United States to which U.S. workers can be referred." See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987).