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U.S. Citizenship
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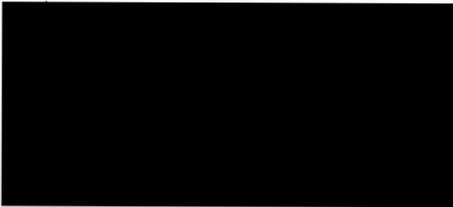
Office: NEBRASKA SERVICE CENTER

Date: MAR 12 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a medical center. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for Schedule A, Group 1 labor certification pursuant to 20 C.F.R. § 656.5(a). The director determined that the petitioner had not established that it had properly posted notice of filing an application for permanent employment certification for ten consecutive business days at the beneficiary's intended place of employment. The director also concluded that the petitioner had not shown that it had published notice of filing such application in its in-house media in accordance with normal procedures used by the petitioner when recruiting, within its organization, for registered nurses. Therefore, the director denied the petition.

The record shows that the appeal is properly filed and timely. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's February 17, 2006 denial, the two issues in this case are whether the petitioner established that it properly posted notice of filing an application for permanent employment certification for ten consecutive business days at the beneficiary's place of employment and whether it published notice of filing such application in its in-house media in accordance with procedures which it normally uses for recruiting registered nurses.

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 or seasonal nature, for which qualified workers are not available in the United States.

On November 14, 2005, the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse. Aliens who will be permanently employed as registered nurses are identified on Schedule A as set forth at 20 C.F.R. § 656.5 as being aliens who hold occupations for which it has determined there are not sufficient U.S. 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 U.S. workers who are similarly employed.

An employer shall apply for a labor certification for a Schedule A occupation by filing an ETA Form 9089, Application for Permanent Employment Certification, in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. Pursuant to 20 C.F.R. § 656.15, a Schedule A application shall include:

- 1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with § 656.40 and § 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 § 656.10(d).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Given that the instant matter was accompanied by an application for Schedule A designation, the priority date for this petition is the date the ETA Form 9089 was properly filed with CIS or November 14, 2005. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$26.50 an hour or \$55,120 annually.

The AAO takes a *de novo* look at issues raised in the denial of the petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.¹

Relevant evidence in the record includes the following: counsel's appeal brief; a statement dated March 1, 2006 from [REDACTED] the petitioner's Nursing Manager; the notice of filing of an application for permanent employment certification signed by Mr. [REDACTED] which indicates that the petitioner posted notice of filing such an application at Hennepin County Medical Center;² and a copy of the petitioner's October 26, 2005 "Patient Care Services Bulletin" in which the petitioner published an announcement that it sought to fill the registered nurse position that is the position which underlies its application for permanent employment certification. The record does not contain any other documentation relevant to the issue of whether the petitioner properly posted notice of filing an application for permanent employment certification at its facility or whether it published such notice in its in-house media in accordance with those procedures used to announce the availability of registered nurse vacancies similar to that which is the subject of the application for permanent employment certification in this matter.

The regulation at 20 C.F.R. § 656.10(d)(1) provides in relevant part:

In applications filed under §§ 656.15 (Schedule A), 656.16 (Shepherders), . . . 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...
- (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

¹ 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).

² This office notes that in its posting of the filing of the application, the petitioner indicated that it had filed an Application for Alien Employment Certification pursuant to 20 C.F.R. § 656.20. This is incorrect. The posting should have stated that the petitioner had filed an Application for Permanent Employment Certification pursuant to 20 C.F.R. § 656.10. When preparing the posting, the petitioner apparently used language and a citation from regulations which were in effect prior to the enactment of the current regulations.

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.*

(Emphasis added.)

According to the regulation at 20 C.F.R. § 656.10(d)(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.

The record reflects that the petitioner posted notice of filing an application for permanent employment certification at its facility from Monday, October 3, 2005 through Friday, October 14, 2005. The regulation at 29 C.F.R. § 2510.3-120(e) defines a "business day" as "any day other than Saturday, Sunday or any other day designated as a holiday by the Federal Government." This office notes that Monday, October 10, 2005 was a Federal holiday. Thus, the notice was posted for only nine consecutive business days. This office finds that this posting does not meet the requirements for posted notices to the employer's employees as set forth at 20 C.F.R. § 656.10(d)(1)(ii).

Counsel's assertions that the regulation at 29 C.F.R. § 2510.3-120(e) is a "little known" regulation within the U.S. Department of Labor's regulations, that CIS did not specifically define the term "business days" within its own regulations and that, consequently, counsel may, if she chooses, define the language "ten business days" as having no distinction from "ten days" because the petitioner's facility never closes are misplaced. The regulation could have required that the notice of the application be posted "ten days." Instead, it mandates that it be posted "ten business days." The modifier "business" adds meaning to the regulation which is defined at 29 C.F.R. § 2510.3-120(e).

Moreover, the petitioner failed to demonstrate that it published notice of filing an application for permanent employment certification in any and all of its in-house media in accordance with the normal procedures used for the recruitment of similar positions in its organization, an additional requirement set forth at 20 C.F.R. § 656.10(d)(1)(ii). As stated by the director in his denial, current regulations mandate that the petitioner provide evidence that it published notice of filing the application for permanent employment certification in its in-house media. Any assertion that the petitioner may satisfy this requirement by documenting for the

record that it published an *announcement of the job vacancy* which is the subject of its application for permanent employment certification is misplaced.

The record contains no evidence that the petitioner ever published notice of filing an application for permanent employment certification for a registered nurse position in its "Patient Care Services Bulletin" or in any other of its in-house media in accordance with the normal procedures used for the recruitment of registered nurses in the petitioner's organization, as required by the regulations. *See* 20 C.F.R. § 656.10(d)(1)(ii).

The petitioner must establish eligibility at the time the Form I-140 was filed. *See* 8 C.F.R. § 103.2(b)(12). Thus, this deficiency would not be overcome were the petitioner to publish notice of its application for employment certification at this date.

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, the petitioner has not met that burden.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.