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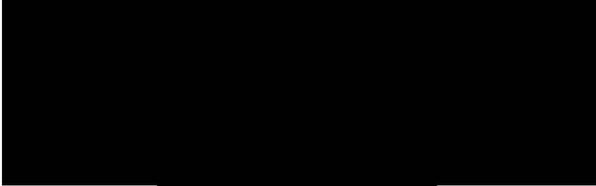
U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
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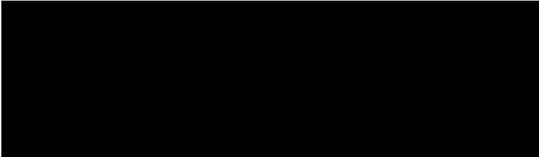
Office: NEBRASKA SERVICE CENTER

Date: **AUG 04 2008**

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 hospital. 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 I 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 between 30 and 180 days prior to the filing of the application. 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, timely and makes a specific 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.

As set forth in the director's March 7, 2007 denial, the two issues in this case are whether the petitioner established that it properly provided a notice of filing between 30 days and 180- days before filing the application 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 June 15, 2006, 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 on June 15, 2006. See 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$23.75 an hour or \$49,400 annually.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 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 relevant evidence in the record, including new evidence properly submitted on appeal.<sup>1</sup> On appeal, counsel submits a brief, a copy of notice of filing previously submitted, and printouts from the petitioner's website of employment opportunities posted on May 5, 2006 and May 12, 2006 respectively. Other relevant evidence in the record includes the notice of filing. 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 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 (Sheepherders), . . . 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 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

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<sup>1</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).

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.

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, May 15, 2006 through Tuesday, May 30, 2006. The director noted that May 20 and 21 fell on a weekend, and thus, the ten consecutive business days period ended on Friday, May 26, 2006. However, the instant petition and accompanying labor certification application were filed on June 15, 2006, only 20 days after the required posting. Therefore, the director concluded that a proper notice was not provided between 30 and 180 days before filing the application.

On appeal counsel asserts that the same position was also posted on May 5, 2006 and May 12, 2006, and that since the petitioning hospital opens seven days a week, the business days should include Saturdays and Sundays, and therefore, the petitioner posted the notice of filing 32 days (from May 5, 2006) before filing the application on June 15, 2006.

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. New Department of Labor (DOL) regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym 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. One of the new changes in the PERM regulation is that a notice of filing must be posted "ten business days" instead of "ten days" under the previous regulation. The new PERM regulation mandates that it be posted ten business days. 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." The regulation expressly provides that a business day is not defined on whether the petitioner operates on that day, but defined as any day other than Saturday, Sunday or Federal holiday. Therefore, a notice of filing must be posted for ten business days excluding Saturdays, Sundays and Federal holidays for the purposes of compliance with the requirements for posted notices set forth at 20 C.F.R. § 656.10(d)(1)(ii).

The regulations quoted above clearly require that the notice be posted for at least 10 consecutive business days and be provided between 30 and 180 days before filing the application. Counsel asserts on appeal that the

same position was also posted on May 5, 2006 and May 12, 2006 and thus, the petitioner mailed the application 32 days after the May 5, 2006 posting. However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The evidence counsel submitted to support his assertions includes printouts from the petitioner's website of employment opportunities posted on May 5, 2006 and May 12, 2006 respectively. However, the website postings do not indicate a notice of filing was actually posted in a clearly visible and unobstructed manner for at least 10 consecutive business days at the facility or location of the employment 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, such as 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). The website postings did not contain the rate of pay, state the purposes of the notice (as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity), state that any person may provide documentary evidence bearing on the application to the Certifying Officer of DOL and provide the address of the appropriate Certifying Officer. Therefore, the website postings alleged to be posted on May 5 and May 12, 2006 respectively did not meet the requirements for the notification of filing set forth by the DOL regulations. 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.

The submitted notice of filing alleged to be posted for the period from May 15, 2006 to May 30, 2006<sup>2</sup> shows that the petitioner conducted and completed its ten business day posting responsibility on Friday, May 26, 2006 because May 20 and 21 fell on Saturday and Sunday respectively. Therefore, the petitioner did not comply with the requirements of proving the notice of filing which was posted for ten consecutive business days between 30 days and 180 days before filing the labor certification application, but filed the application 10 days after it fulfilled its posting obligation. Counsel's assertion that the 30 to 180 day period begins on the date the notice of filing is first be posted is misplaced. The regulation requires the petitioner complete its ten business day posting. The DOL states in its Frequently Asked Questions and Answers that:

If the order is posted on Monday, April 30, 2007, Monday is day 1, Friday, May 4<sup>th</sup>, is day 5; the following Monday, May 7<sup>th</sup>, is day 6; and Friday, May 11<sup>th</sup>, is day 10. May 11<sup>th</sup> is the last day of this time period and is therefore defined as the event and is not counted when calculating the 30 days restriction period to filing timeline. To calculate the 30 day timeline, May 12<sup>th</sup>, is day1, May 13<sup>th</sup>, day2, May 23<sup>rd</sup>, day 12; May 31<sup>st</sup>, day 20; and June 10<sup>th</sup>, is day 30. The application can be filed on June 10, 2007.

See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (accessed on July 23, 2008).

In addition, in the instant case, the petitioner did not even start its ten consecutive business day posting 30 days before filing. Here, the petitioner failed to submit evidence that the notice was properly posted in accordance with 20 C.F.R. § 656.10(d)(3)(iv).

While counsel asserts that the petitioner complied with the "spirit" of the law, counsel provides no legal authority that would allow us to waive the regulatory 30-180 period prescribed by DOL. 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. §

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<sup>2</sup> The notice of filing indicated that the notice was posted May 15, 2006 to May 30, 2006, however, it is noted that the record does not contain any attestation from the petitioner confirming that the notice of filing was actually posted for at least ten consecutive business days.

656.10(d)(1)(ii). PERM 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. On appeal counsel submits prints-out from the petitioner's website for a list of open registered nurses positions. However, 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 website 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 regulation at 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)(1) and (12). Since the petitioner failed to post the notice in compliance with regulations prior to the filing, any subsequent effort by the petitioner to correct the notice of posting would constitute a material change to the petition. If the petitioner was not already eligible when the petition was filed, subsequent developments cannot retroactively establish eligibility as of the filing date, and cited *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Com. 1971.)

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.