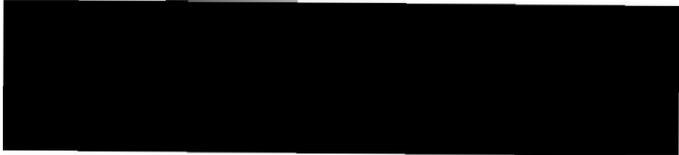


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FILE [REDACTED]
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Office: NEBRASKA SERVICE CENTER

Date: **AUG 21 2008**

IN RE: Petitioner:
Beneficiary:



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 at the beneficiary's intended place of employment. 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 November 20, 2006 denial, the issue in this case is 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.

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 May 11, 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 or May 11, 2006. See 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$63,700 annually.¹

¹ The prevailing wage as identified on a document that accompanied the ETA Form 9089 produced by the New York State Department of Labor, is \$61,797 for a Skill Level 2 Registered Nurse.

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.² On appeal, the petitioner submits a letter and the following document:

A copy of a document entitled "Notice of Filing." The notice is signed by [REDACTED] Assistant Vice President, and dated November 30, 2006. The notice states that an application for the employment of one or more alien workers for the position of registered nurse will be filed with the Department of Homeland Security and the notice will be posted for ten consecutive business days, ending between 30 to 180 days before filing the permanent labor certification application. The notice stated that the rate of pay for the position is \$62,400,³ and the location of employment is 1276 Fulton Avenue, Bronx, New York. On the second page, the document states that the notice is being provided to workers in the place of intended employment by posting a clearly visible and unobstructed notice for at least ten consecutive business days, in conspicuous locations in the workplace, that include but are not limited to locations in the immediate vicinity of the wage and hour notices, and by publishing the notice of filing 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 petitioner's organization. The document identifies the location where the notice was posted as "1276 Fulton Avenue, Bronx, New York," and the means of in-house notice, if applicable as "printed." The notice indicates it was posted April 10, 2006 and removed April 25, 2006.

With the initial I-140 petition, the petitioner submitted the initial Notice of Filing document, that is identical in contents and signature to the one submitted on appeal, except for the posting dates and the date of signature. The initial notice states that the notice was posted from April 10 to April 20, 2006, and indicates that [REDACTED], signed the document on April 20, 2006. In the list of contents for the initial I-140 petition, prior counsel submitted a copy of the petitioner's advertisement in the publication *Nursing Spectrum*, dated March 27, 2006. The advertisement lists numerous nursing and management fields currently being recruited by the petitioner.

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 the petitioner's facility or the beneficiary's respective place of employment.

On appeal, counsel states that the initial notice of filing had a typographical error on it which regard to the dates of posting the notice.

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...

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). 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).

³ The AAO notes that this rate of pay is lower than the proffered wage on the Form ETA 9089, although it is higher than the prevailing wage, previously discussed.

(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 electronic or print that was 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 AAO views the record as presently constituted to contain conflicting evidence. The record reflects that the petitioner posted notice of filing an application for permanent employment certification at its facility from April 10 to April 20, 2006. As the director correctly stated, 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." While this regulation does not relate to labor certification posting requirements, the DOL has adopted this definition for the posting period. Specifically, in its responses to frequently asked question posted on its website, DOL provided the following:

As another example, the regulation requires Notice of Filing posting for a time period of ten consecutive business days. If the order is posted on Monday, April 30, 2007, Monday is day 1, Friday, May 4, is day 5; the following Monday, May 7 is day 6; and Friday, May 11, is date 10.

* * *

If the Notice of Filing is posted Monday, August 20, 2007, the posting dates must be August 20 – August 31, 2007, and the earliest filing date permissible is Sunday, September 30, 2007

(the 30 day prior to filing limitation has no business day restriction and, therefore, weekends and holidays are included in the count).

See www.foreignlaborcert.doleta.gov/faqsanswers.cfm (accessed July 23, 2008). This office notes that Saturday, and Sunday, April 15 and 16, which fell within the period of posting, were weekend days. Thus, the notice was posted for only nine consecutive business days.

On appeal, the petitioner submits a document that indicates the posting notice for the petitioner was posted from April 10 to April 25, The posting notice submitted on appeal for the petitioner is signed by [REDACTED] on November 30, 2006, ostensibly after the receipt of the director's decision dated November 20, 2006. The petitioner provides no explanation for the changed times of posting, although counsel asserts that the changed dates were based on a typographical error. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

The AAO notes that if, as the petitioner claims on appeal, the posting notice was in place from April 10 to April 25, it is not clear that the petitioner provided the posting notice 30 days prior to filing the I-140 petition on May 11, 2006. See 20 C.F.R. § 656.10(d)(3)(iv). Specifically, if the posting notice was removed on April 20, 2006, the petitioner filed the I-140 petition after only 21 days and if the petitioner's posting notice was removed on April 25, 2006, the petitioner filed the I-140 petition after only 16 days. See Time Frame Frequently Asked Questions, numbers three and five, available at www.foreignlaborcert.doleta.gov/faqsanswers.cfm. This office finds that the petitioner's initial posting notice and the evidence submitted on appeal do 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). Thus, the AAO concurs with the director's decision.

Beyond the decision of the director, the AAO finds that the record lacks further documentation with regard to the petitioner's placement of the notice of filing, and the petitioner's use of in-house media to advertise the position. 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*, 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 record is not clear where the petitioner posted notice of the filing of the application for permanent employment certification within the Bronx-Lebanon Medical Complex, and whether it published notice of filing the application for permanent employment certification in any and all 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). The only documentation in the record with regard to newspaper, Internet, or other media is the copy of the *Nursing Spectrum* advertisement, which identifies generic nursing areas, rather than specific jobs. Although the petitioner's notice of filing appears to indicate that in-house media was utilized to advertise the position, the petitioner submitted no further documentation of any such in-house media outreach. The regulation at 20 C.F.R. § 656.10(d)(1)(ii) requires a copy of the posted notice and copies of all the in-house media.

The AAO also notes that although the petitioner submitted documentation of the beneficiary's graduation from Mercy College, Westchester County, New York, with a bachelor of science degree, the record contains no further documentation, such as a transcript of coursework that establishes the beneficiary's baccalaureate degree was for a bachelor of science in nursing. Although the minimum qualifications for the proffered position, as stipulated by the Form ETA 9089 is an Associate's Degree, the record also does not contain any documentation as to the beneficiary's coursework in Taiwan that resulted in an Associate's Degree in Nursing. Without such documentation, the record is not complete with regard to the beneficiary's qualifications to perform the duties of the proffered position.

The petitioner must establish eligibility at the time the Form I-140 was filed. *See* 8 C.F.R. § 103.2(b)(1), (12). 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. 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.