

identifying data related to
prevent clearly unwarranted
invasion of personal privacy

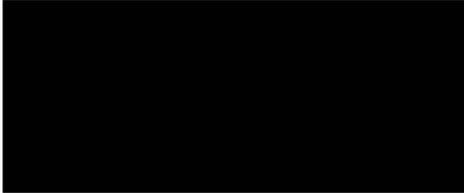
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

BE



FILE: LIN-06-133-53827 Office: NEBRASKA SERVICE CENTER Date: JAN 31 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 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 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. 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 September 21, 2006 denial, the primary 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.

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 April 3, 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, i.e. April 3, 2006. See 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$34.16 an hour (\$71,052.80 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.¹ On appeal, counsel submits a brief, a copy of 29 C.F.R. § 2510.3-102, a page from Black's Law Dictionary for the definition of business hours and *In the Matter of HealthAmerica*, BALCA 2006 PER 1, July 18, 2006. Other relevant evidence in the record includes a notice of filing of application for alien employment certification under U.S. Department of Labor (DOL) Schedule A, Group I and a certificate of compliance with posting notice dated February 24, 2006 from [REDACTED] Vice-President of Human Resources. 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.

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 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.

The record reflects that the petitioner posted notice of filing an application for permanent employment certification at its facility from Friday, February 10, 2006 through Thursday, February 23, 2006. 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 director noted that February 20, 2006 was a Federal Holiday, and February 11, 12, 18 and 19 fall on a weekend and thus, determined that the notice was not posted for the required ten business days.

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).

Counsel's assertions on appeal that no authority is given for the application of the regulation at 29 C.F.R. § 2510.3-120(e) to the issue of posting requirement, that the relevant PERM regulations are noticeably silent on this issue, and that according to the definition of business hours from Blacks Law Dictionary, "ten business days" have no distinction from "ten days" because the petitioner's facility never closes, are misplaced. The regulation at 29 C.F.R. § 2510.3-120(e) is also DOL's regulation. There are no regulations or precedents to prohibit applying one DOL regulation to another regulatory subject under DOL's jurisdiction. Counsel did not submit any legal authority to support his assertion. Instead, the PERM regulation on the posting notice issue cites and uses DOL's regulations at 29 C.F.R. § 516.4 and 29 C.F.R. § 1903.2(a). The regulatory history shows that PERM intends to define "business day" at 29 C.F.R. § 2510.3-120(e) instead of the definition of "business hours" in Blacks Law Dictionary. The pre-PERM regulation required that the notice of the application be posted "ten days," however, PERM mandates that it be posted for "ten business days." The modification from ten consecutive days to ten consecutive business days illustrates DOL's intent to increase the time frame requirement of posting, and adoption of the definition set forth at 29 C.F.R. § 2510.3-120(e). DOL stated the following about the duration of the notice that:

Two commenters observed the NPRM proposed the period the notice must be posted be increased from 10 consecutive days to 10 consecutive business days. One commenter indicated this increase was reasonable We agreed and the final rule provides that notice provided by posting to the employer's employees at the facility or location of employment must be posted for 10 business days.

See The Preamble, Federal Register /Vol. 69, No. 247 / Monday, December 27, 2004 at 77339.

Therefore, it is not reasonable to interpret "business day" with counsel's interpretation or definition. If the meaning of business day were interpreted as counsel asserts, the modification in PERM would be meaningless. The AAO concurs with the director's decision that the posting notice did 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).

On appeal, counsel also cites *In the Matter of HealthAmerica*, BALCA 2006 PER 1, July 18, 2006. However, counsel does not state how case holdings applied to labor certification applications by DOL's Board of Alien Labor Certification Appeals (BALCA) are applicable to the instant petition before the Department of Homeland Security's AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has established that it posted a proper notice of filing an application for permanent employment certification in compliance with the requirements of the regulation at 20 C.F.R. § 656.10(d). 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).

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 posting notice submitted in the instant case states in pertinent part that:

This notice is being provided as a result of the filing of an application for permanent alien labor certification for the above job opportunity. Any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the Regional Certifying officer of the Department of Labor at USCIS, Nebraska Service Center, 850 S. Street, Lincoln, NE 68508.

The address provided in the posting notice is not the one of the appropriate Certifying Officer, but of CIS' Nebraska Service Center. The job opportunity in the instant case is located in California. The PERM regulation was effective as of March 28, 2005, and applies to the instant case. While the local employment service office and/or the regional certifying officer in California had jurisdiction over a California worksite under the old DOL regulation, the certifying officer at the Chicago National Processing Center is the appropriate certifying officer with jurisdiction over California among other states under the PERM regulation. The petitioner failed to provide the correct address of the appropriate certifying officer in its posting notice in the instant case and therefore, the petitioner failed to meet the requirements for posted notices to the employer's employees as set forth at 20 C.F.R. § 656.10(d)(3)(iii).

In addition, the regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is in this case the date the complete, signed petition (including all initial evidence and the correct fee) is properly filed with CIS. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the

priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the priority date is April 3, 2006.

The petitioner claimed on the petition that it currently employs 2,050 workers.² However, the petitioner did not submit a statement from its financial officer establishing its ability to pay the proffered wage. Given the record as a whole and the petitioner's history of filing petitions, we find that CIS need not exercise its discretion to accept such a statement even if it were provided. CIS records indicate that the petitioner has filed 40 Form I-140 petitions with CIS service centers since 2004. In addition, the petitioner has also filed 38 Form I-129 nonimmigrant petitions since then. Consequently, CIS must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. If we examine only the salary requirements relating to the 40 I-140 petitions, the petitioner would be need to establish that it has the ability to pay combined salaries of \$2,842,000. Given the number of immigrant and nonimmigrant petitions, we cannot rely on a letter from a financial officer referencing the ability to pay a single unnamed beneficiary.

The petitioner submitted its Form 990 Return of Organization Exempt from Income Tax for its fiscal year 2003 as evidence of its continuing ability to pay the proffered wage from the priority date to the present. The tax return indicates that the petitioner is a non profit organization and its fiscal year runs from July 1 to June 30. The petitioner's Form 990 Return of Organization Exempt from Income Tax for its fiscal year 2003 covers a period from July 1, 2003 to June 30, 2004. The record before the director closed on April 3, 2006 with the receipt by the director of the petitioner's submissions of the initial filing. As of that date the petitioner's federal tax return for its fiscal year 2004 (July 1, 2004 to June 30, 2005) should have been available. However, the petitioner did not submit its tax return or any other regulatory-prescribed evidence of its ability to pay the proffered wage for its fiscal year 2004. Nor did counsel explain whether any of these documents were available and reasons for not submitted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner failed to establish its ability to pay the proffered wage beginning on the priority date and continuing to the present with the most recent available regulatory-prescribed evidence.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been approved or pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its approved or

² The petitioner claims to have 2.050 employees on the petition. We assume that the petitioner meant 2,050 employees.

pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). CIS records show that the petitioner had 23 immigrant petitions including the instant case either filed, pending, approved or the beneficiary obtained his/her lawful permanent residence in its fiscal year of 2005 (July 1, 2005-June 30, 2006), the year of the priority date in the instant case. The record does not contain any evidence to establish the petitioner's ability to pay the proffered wages to all the beneficiaries that fiscal year.

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.