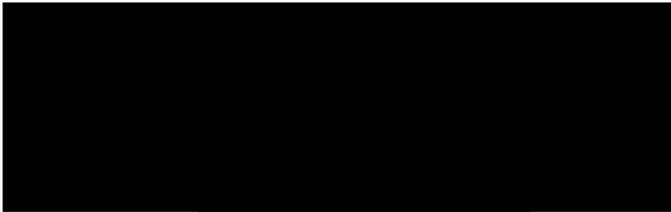


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U.S. Citizenship  
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Services

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BC

JUN 30 2008

FILE: [Redacted] Office: NEBRASKA SERVICE CENTER  
EAC 06 057 52113

Date:

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, Chief  
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 and hospital corporation. It seeks to employ the beneficiary permanently in the United States as a staff-nurse/registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5(a), Schedule A, Group I.<sup>1</sup>

The director determined that the petitioner had not established that it had properly posted notice of filing an application for permanent employment certification. Specifically, the director stated that notice of the filing of the Application for Permanent Employment Certification (Form ETA-9089) was not posted between 30 and 180 days before filing the application. Further, the director found, contrary to regulation, the petitioner had not submitted a prevailing wage determination (PWD) from the New York State Department of Labor that would have provided necessary information for the blanket labor certification, and, the Form ETA-9089, Sections F and K, submitted with the petition did not provide required information regarding the prevailing wage determination (PWD) and the beneficiary's employment experience. The director denied the petition accordingly.

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 pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

Issues in this case are:

- Whether or not the petitioner had posted the notice of filing of the Application for Permanent Employment Certification between 30 and 180 days before filing the Application for Permanent Employment Certification.
- Whether or not the petitioner had submitted a prevailing wage determination (PWD) from the New York State Department of Labor that would have provided necessary information for the blanket labor certification.

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<sup>1</sup> 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. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM, for Program Electronic Review Management. 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 petition and the blanket labor certification were accepted by CIS on December 16, 2006. This citation and the citations in this discussion are to the DOL PERM regulations.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

- Whether or not the Form ETA-9089, Sections F and K, submitted with the petition did provide required information regarding the PWD, its validity period, and the beneficiary's employment experience.

*Notice of the Filing of the Application for Permanent Employment Certification*

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, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(ii) of the Act as a professional (registered nurse). Aliens who will be employed as registered nurses are listed on Schedule A. The Director of the United States Employment Service has determined that an insufficient number of United States workers are able, willing, qualified, and available to fill the positions available in those occupations, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed. 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.

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 filed with CIS or December 16, 2005. *See* 8 C.F.R. § 204.5(d).

The regulation at 20 C.F.R. §656.15(c)(2) specifies that professional nurses are among those qualified for Schedule A designation if they have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination and hold a full and unrestricted license to practice professional nursing in the State of intended employment or "who have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) administered by the National Council of State Boards of Nursing."

The regulation at 20 C.F.R. § 656.15 states in pertinent part for applications for labor certification for the Schedule A occupation of professional nurse 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 (PWD) 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 [Department of Homeland Services], 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 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.

*Submission of a Prevailing Wage Determination (PWD) in accordance with Sec. 656.40(a).*

The regulation at 20 C.F.R. § 656.40(a) states in pertinent part:

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 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.

In the subject case the Form ETA-9089, Sections F and K, submitted with the petition did not provide required information regarding the PWD and the beneficiary's employment experience. No PWD was submitted with the petition and Section F was incomplete and Section K of the Form ETA-9089 was left blank.

The regulation at 20 C.F.R. § 656.10(d)(1)(i) and (ii) states in pertinent part the following:

In applications filed under Sec. Sec. 656.15 ... (Schedule A), 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. 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 regulation at 20 C.F.R. § 656.10(d)(3)(i)(ii)(iii) and (iv) states the following:

(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.

As stated, in this case, the Form I-140 petition was accepted for processing on December 16, 2005. Accompanying the petition were, *inter alia*, copies of the following documents: an Application for Permanent Employment Certification (U. S. Department of Labor (DOL) Form ETA 9089); a letter from counsel dated December 14, 2005; a letter written in support of the beneficiary from the petitioner dated December 13, 2005; a statement and form from the California Board of Registered Nursing dated May 2, 2005, addressed to the beneficiary; two copies of Form ETA-9089 dated by the petitioner December 14, 2005; a statement entitled "Attestation" with the Notice of Filing of an Application for Alien Employment Certification under U.S. Department of Labor Schedule A, Group I for a job located at the petitioner's hospital and nursing facility in New York, New York, made between December 5, 2005 with the end date stated as "Closing Date: Open Continuously;" a copy from the DOL website <http://www.flcdatacenter.com> dated December 5, 2005, entitled "Online Wage Library - OES Wage Search Results;" and other documents related to the beneficiary's qualifications.

On August 17, 2006, the director denied the petition.

On September 18, 2006, the petitioner appealed. Counsel contested the director's findings and contended that omissions noted by the director in documents provided by the petitioner were inadvertent and therefore excusable omissions.

More specifically, counsel stated that a prevailing wage determination (PWD) for the same occupation was in fact secured prior to the filing of the petition. The AAO notes that the petition was filed on December 16, 2005, and a review of the record shows that the only PWD in evidence as submitted is dated September 29,

2006. Therefore counsel's assertion is not supported by the evidence. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

*The Regulations at 20 C.F.R. § 656.10(d)(3)(i)(ii)(iii) and (iv) - the Posting Requirements*

Employers must comply with the posting requirements that are those set forth above at 20 C.F.R. § 656.10(d)(3)(i)(ii)(iii) and (iv). There is no evidence in the record of proceeding that the petitioner posted the job posting the requisite 30 to 180 days prior to filing the petition and therefore the notice fails to conform to the posting requirement set forth at 20 C.F.R. § 656.10(d)(3)(iv). The petitioner had submitted a statement entitled "Attestation" with the Notice of Filing an Application for Alien Employment Certification under U.S. Department of Labor Schedule A, Group I for the job located at the petitioner's hospital and nursing facility in New York, New York, made between December 5, 2005 with the end date stated as "Closing Date: Open Continuously." The petition was filed on December 16, 2005. Therefore according to the record of proceeding, the job posting was not made 30 to 180 days prior to filing the petition

The petitioner had not posted the notice of the filing of the Application for Permanent Employment Certification between 30 and 180 days before filing the Application for Permanent Employment Certification.

*The Regulation at 20 § C.F.R. § 656.40(c) - the Validity Period.*

The regulation at 20 § C.F.R. § 656.40(c) states in pertinent part:

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 §§ 656.17(d) or 656.21 within the validity period specified by the SWA.

The Form I-140 petition was accepted for processing on December 16, 2005. The Form ETA-9089's Section F<sup>3</sup> was incomplete as it did not state the prevailing wage tracking number or the expiration date of the referenced PWD. The Form ETA-9089, Section F.7 as submitted stated a determination date of July 13, 2005, but no expiration date. Therefore the validity period was not established by the petitioner on filing and could not be determined by the director. The "original PWD" submitted by counsel on appeal by his letter dated October 10, 2006, states a determination date of September 29, 2006.

A petition cannot be approved at a future date under a new set of facts. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Moreover, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The petitioner has not demonstrated that the petition was approvable when submitted. We find that it may not be approved for the reasons above stated.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>3</sup> Section F is entitled "Prevailing Wage Information as provided by the State Workforce Agency."