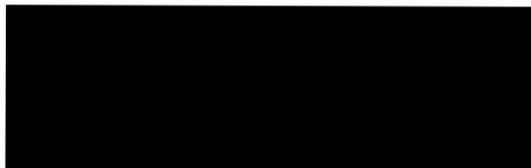


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FILE: LIN 06 018 52423 Office: NEBRASKA SERVICE CENTER Date: **SEP 24 2008**

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:

SELF-REPRESENTED

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 Acting Director (director), Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a skilled nursing facility. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. As set forth in the director's April 5, 2006 denial, the director determined that the petitioner had not established that the beneficiary is qualified for the proffered position and that the petitioner failed to submit a prevailing wage determination (PWD) from the appropriate state workforce agency (SWA). The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes specific allegations 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.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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 nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), 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 filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse on October 24, 2005. The petitioner initially filed ETA Form 750 with the petition, and later filed ETA Form 9089, Application for Permanent Employment Certification, in response to the director's request for evidence (RFE) dated December 27, 2005.<sup>1</sup> Aliens who will be permanently employed as registered nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.5 for which the Secretary of the U.S. Department of Labor (DOL) has determined that there are not sufficient United States 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 United States workers similarly employed. Also, according to 20 C.F.R. § 656.5, aliens who will be permanently employed as professional nurses must have: (1) have received a certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); (2) hold a permanent, full and unrestricted license to practice nursing in the state of intended employment; or (3) have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

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 United States workers. New 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. Thus, PERM applies to the instant case.

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<sup>1</sup> This office notes that the ETA Form 9089 does not contain the prevailing wage information requested at Section F or the wage offer information at Section G.

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).

Under 20 C.F.R. § 656.10(d)(1), the regulations require the following:

In applications filed under §§ 656.15 (Schedule A), 656.16 (Shepherders), 656.17 (Basic Process), 656.18 (College and University Teachers), and 656.21 (Supervised Recruitment), 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.

Additionally, 20 C.F.R. § 656.10(d)(3) requires the following:

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 first issue in this case is whether the petitioner has established that the beneficiary is qualified for the proffered position. The director noted that the petitioner had not demonstrated that the beneficiary had received a certificate from the CGFNS, held a permanent, full and unrestricted license to practice nursing in the state of intended employment; or passed the NCLEX-RN as of the date of filing.

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>. On appeal, the petitioner submits the beneficiary's CGFNS certificate issued March 21, 2006.<sup>3</sup>

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In the instant case, the Form ETA 9089, Section H, Items 4-6, set forth the minimum education, training, and experience that an applicant must have for the position of registered nurse. In the instant case, Section H describes the requirements of the proffered position as follows:

4. Education	Bachelor's
4-B. Major Field of Study	Nursing
5. Training	No
6. Experience	No

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<sup>2</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).

<sup>3</sup> **The director requested the beneficiary's CGFNS certificate and the PWD in his RFE.** The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the beneficiary's CGFNS certificate and the PWD to be considered, it should have submitted the documents in response to the director's RFE. *Id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal. Because the evidence submitted on appeal is deficient, we will review the deficiencies.

The Form ETA 9089 states that a foreign educational equivalent is acceptable. Further, Section H, Item 14 of Form ETA 9089 reflects the following special requirements: "Licensed to practice as a registered nurse in the state of Illinois." The beneficiary set forth his credentials on Form ETA 9089 and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. At Section J, the beneficiary indicated that he received his bachelor's degree in 2000 from The Good Samaritan Colleges in the Philippines.<sup>4</sup> While the petitioner submitted evidence to demonstrate that the beneficiary was a licensed registered nurse in the Philippines, the petitioner submitted no evidence to establish that the beneficiary was licensed in the state of Illinois as required by Form ETA 9089. Further, pursuant to 20 C.F.R. § 656.5, the petitioner failed to demonstrate that the beneficiary had received a certificate from the CGFNS, held a permanent, full and unrestricted license to practice nursing in the state of intended employment, or passed the NCLEX-RN, as of October 24, 2005.<sup>5</sup> Therefore, the petitioner has not established that the beneficiary is qualified for the proffered position.

The second issue in this case is whether the petitioner submitted a prevailing wage determination (PWD) from the appropriate state workforce agency (SWA). The regulation at 20 C.F.R. § 656.40(c) states:

*Validity period.* 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 PERM regulations expressly state that an employer must file their application within the validity period specified by the SWA. The PWD submitted on appeal was issued by Illinois Department of Employment Security (IDES), which is the SWA in the instant case. The PWD was issued on March 27, 2006 and indicates that it is valid for the calendar year in which issued, i.e. until December 31, 2006. The record shows that the instant petition was filed on October 24, 2005. The record does not contain any PWD valid on October 24, 2005. Thus, the petitioner did not file its Schedule A application within the validity period specified by IDES. Therefore, the petitioner failed to comply with the PERM regulation pertinent to the PWD validity period at the priority date.

Beyond the decision of the director, the record does not contain evidence that the petitioner properly posted notice of filing the application for permanent employment certification. 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 posting notice provided by the petitioner does not meet the regulatory requirements governing posting requirements. The petitioner certified that it posted the notice from September 1, 2005 to September 14, 2005. The regulation at 20 C.F.R. § 656.10(d)(1)(ii) requires that the notice be posted for at least 10 consecutive business days. This office notes that Monday, September 5, 2005, a date which fell within period of posting, was a Federal holiday.<sup>6</sup> Thus, the notice was posted for only nine consecutive business days. This office

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<sup>4</sup> The beneficiary's diploma from Good Samaritan Colleges indicates that he received a Bachelor of Science in Nursing in March 2000.

<sup>5</sup> The beneficiary's CGFNS certificate was issued on March 21, 2006, several months after the priority date.

<sup>6</sup> Federal holidays are not "business" days. *See* [www.foreignlaborcert.doleta.gov/faqsanswers.cfm](http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm) (accessed September 8, 2008).

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).<sup>7</sup>

Further, the posting failed to meet the requirements of 20 C.F.R. § 656.10(d)(3)(iii). The posting notice does not provide the address of the appropriate Certifying Officer. Therefore, the petitioner has failed to submit a regulatory-prescribed posting notice that conforms to the regulatory requirements for Schedule A registered nurses.

The petition will be denied for the reasons discussed above, with each considered as an independent and alternative basis for denial. 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>7</sup> This office notes that the posting notice lists the requirements for the proffered position as "Bachelor/Associate's Degree in Nursing or equivalent, IL Registered Nurse License or Eligible for Licensure." These requirements do not match the requirements for the proffered position listed on ETA Form 9089 as set forth herein.