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U.S. Citizenship  
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Services

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FILE: LIN 06 133 53856 Office: NEBRASKA SERVICE CENTER Date: **JAN 27 2009**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

  
John F. Grissom, Acting 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 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 blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. The acting director determined that the evidence submitted does not demonstrate that the notice of filing the Application for Alien Certification was completed in accordance with the regulation at 20 C.F.R. § 656.10(d). Accordingly, the director denied the petition.

The petitioner states it is part of a medical center established in 1965 and as of 2006, the system employed 2,050 individuals.

On appeal, counsel submits a brief and additional evidence.

As set forth in the director's denial dated September 21, 2006, an issue in this case is whether or not the notice of filing the Application for Alien Certification was properly posted for ten consecutive business days in accord with the regulation at 20 C.F.R. § 656.10(d).

Also beyond the decision of the director, an additional issue in this case is whether or not the petition as filed contained documentary evidence that the notice of filing was made in any in-house media (meaning within the petitioner's own organization) according to the regulation at 20 C.F.R. § 656.10(d)(1)(ii).

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, Form I-140 for classification of the beneficiary under section 203(b)(3)(A)(i) or (ii) of the Act as a registered nurse was accompanied by a Form ETA 9089. The petition was accepted for filing on April 3, 2006. A receipt date is assigned upon the proper filing of the petition with the required filing fee. *See* 8 CFR §§ 103.2(a)(1)(d), and, 103.2(a)(7)(i).

The regulation at 8 CFR § 204.5(d) states in pertinent part:

Priority date ... The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation within the Department of Labor's Labor Market Information Pilot Program shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with the Service ....

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>1</sup>

As a preface to the following discussion, new U.S. Department of Labor (DOL) labor certification regulations "PERM" became effective as of March 28, 2005. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). PERM applies to labor certification applications for the permanent employment of aliens filed on or after that date. 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. After March 28, 2005, the DOL Form ETA 750 was replaced by the ETA Form 9089, Application for Permanent Employment Certification. As the I-140 was filed on April 3, 2006, PERM regulations apply to this case.

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) or (ii) of the Act as a registered nurse on April 3, 2006. Aliens who will be permanently employed as professional nurses are listed on Schedule A occupations are set forth at 20 C.F.R. § 656.5, and are occupations for which the Director of the United States Employment Service has determined there are not sufficient United States workers who are able, willing, qualified, and available for the occupations and the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations.

An employer seeking a labor certification for an occupation listed on Schedule A may apply for that labor certification under the regulation at 20 C.F.R. §656.5, as follows:

Schedule A

(a) Group I:

\* \* \*

(2) Aliens who will be employed as professional nurses; and

(i) Who have received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS);

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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).

- (ii) Who hold a permanent, full and unrestricted license to practice professional nursing<sup>2</sup> in the state of intended employment; or
- (iii) Who have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Permanent Employment Certification (Form ETA-9089 at Part A) in duplicate with the appropriate U.S. Citizenship and Immigration Services (USCIS) office.

Pursuant to 20 C.F.R. § 656.15 applications for labor certification for Schedule A Occupations require 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 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, as part of its labor certification application, documentary evidence of the following:

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<sup>2</sup> Under the regulations, 20 C.F.R. § 656.5(a)(3)(i), "professional nurse" means a person who applies the art and science of nursing which reflects comprehension of principles derived from the physical, biological and behavioral sciences. Professional nursing generally includes making clinical judgments involving the observation, care and counsel of persons requiring nursing care; administering of medicines and treatments prescribed by the physician or dentist; and participation in the activities for the promotion of health and prevention of illness in others. A program of study for professional nurses generally includes theory and practice in clinical areas such as obstetrics, surgery, pediatrics, psychiatry, and medicine.

- (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.

With the petition counsel submitted the following relevant evidence: a U.S. Department of Labor, ETA Form 9089, dated March 29, 2006; the notice of posting evidencing that it was posted between February 10, 2006 to February 23, 2006; a prevailing wage determination (PWD) obtained March 28, 2006, from the State of California Employment Development Department for the position of registered nurse; a print-out of a webpage from DOL's "Online Wage Library" for a registered nurse; and approximately 25 pages printed from the petitioner's website as well as information concerning the beneficiary's qualifications.

The director denied the petition on September 21, 2006. Specifically the director found that, although the petition was accompanied by a notice of filing that attested the notice was posted from February 10, 2006, to February 23, 2006, since February 20, 2006 was a federal holiday and since the calendar dates February 11, 12, 18, and 19, all fall on weekends, the notice was not posted for the required ten consecutive business days.

Counsel appealed the director's decision on October 19, 2006, and asserts that the I-140 petition was denied because of an erroneous interpretation of "business day."

According to counsel, the director denied the petition because USCIS does not regard a weekend day (Saturday/Sunday) or a federal holiday as a business day for a hospital.

Counsel contends that the medical community generally keeps its hospitals open 24 hours a day seven days a week for 365 days a year and that every day of the year is a business day for a hospital.

The director cited the regulation at 29 C.F.R. § 2510.3-102 in support of his decision. Counsel contends that the foregoing regulation is only applicable to "ERISA"<sup>3</sup> and the regulation specifically excludes its usage for any other purpose other than for ERISA and cannot be applied to an I-140 petition under Schedule A.<sup>4</sup> Counsel submits on appeal an undated legal brief and the following

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<sup>3</sup> The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 et seq., is a federal law that sets minimum standards for retirement and health benefit plans in private industry.

<sup>4</sup> Counsel also contends that since the notice of filing was posted for ten consecutive business days, the director's decision was erroneous as an error of fact. A discussion of this issue will follow.

evidence: the regulation found at 29 C.F.R. § 2510.3-102; two pages from “*Black’s Law Dictionary*” with the definition of “business hours”<sup>5</sup> and a case decided by the Board of Alien Labor Certification Appeals (BALCA), *In the Matter of HealthAmerica, on behalf of Uthayashanker Wimalendran*, 2006-PER-1 (BALCA 2006).<sup>6</sup> Counsel’s assertions must be qualified as is discussed below.

*The regulations at 20 C.F.R. § 656.10(d)(1)(i) and (ii), the Posting Notice*

In the decision in this matter, the director determined that the evidence submitted by the petitioner does not demonstrate that the notice of filing the Application for Alien Certification was made according to the regulation at 20 C.F.R. § 656.10(d).<sup>7</sup>

The regulation at 20 C.F.R. § 656.10(d), entitled “Notice” states in pertinent part:

(1) In applications filed under Sec. ... 656.15 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

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<sup>5</sup> “Business hours. In general those hours during which persons in the community generally keep their places open for the transaction of business.” *Black’s Law Dictionary* at 199 (Sixth ed. 1990).

<sup>6</sup> According to the case, its central issue is whether or not a Certifying Officer of an Application for Permanent Employment Certification abused his/her discretion when denying the employer’s motion for reconsideration. Despite counsel’s contention, there is no discussion of business hours or business days for posting of the notice of filing in that case. The case did result from the employer’s apparent failure to comply with DOL’s “two-Sunday” newspaper job opportunity advertising policy based upon the contents of the ETA Form 9089 filed in the matter. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS 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).

<sup>7</sup> The regulation at 20 C.F.R. § 656.10 General instructions state in pertinent part:

(a) Filing of applications. A request for a labor certification on behalf of any alien who is required by the Act to be a beneficiary of a labor certification in order to obtain permanent resident status in the United States may be filed as follows:

(3) An employer seeking labor certification for an occupation listed on Schedule A must apply for a labor certification under this section and Sec. 656.15.

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.* [emphasis added]. 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.

(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.

According to the notice of posting found in the record of proceeding, the notice of filing the Application for Permanent Employment Certification in the present matter was provided from

February 10, 2006 to February 23, 2006. As several of those dates fell on the weekend and on a public holiday, the director found that the notice was not posted for ten consecutive business days.

The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of American workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations.<sup>8</sup>

Counsel on behalf of the petitioner contends that since the petitioner is open seven days each week that this fact implicitly exempts it from a plain reading of the regulation or that the regulation does not apply to the petitioner. Chief among the assertions and contentions is counsel's assertion that USCIS has used ERISA to define the term "business day." Counsel has cited the case *In the Matter of HealthAmerica* for the proposition that there is no explicit authority for USCIS to determine the term "business day." *Id.*

As noted above in footnote six to this discussion, the case of *Matter of HealthAmerica* is not on point, and not related to this issue. Further, the case cited by counsel is not precedent that the AAO must follow. Additionally, counsel's logic would require the USCIS certifying officer to determine what a business day means for each petitioner who files a Schedule A blanket labor certification. Counsel has not submitted evidence to demonstrate why compliance with the regulation at 20 C.F.R. § 656.10(d) would be a hardship, or that compliance would be impracticable, unreasonable, detrimental, or increase the petitioner's business expense.

USCIS has the responsibility under regulation to review the blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. USCIS through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, and under PERM must investigate the facts in each case and determine if the material facts in the petition including the certification are true and correct. In this instance, the director conducts the review since in cases involving Schedule A occupations (i.e. registered nurse), USCIS is responsible to review compliance with applicable regulation. This process involves the investigation by USCIS of the petitioner's compliance with regulations promulgated under PERM as well as other relevant DOL regulations.

Changes were made to the permanent labor certification application process for labor certification for the permanent employment of aliens in the United States by the drafters of PERM who changed the old requirement from "10 consecutive days" to "10 consecutive *business* days" to expand the notice requirement for petitioning entity's employers. *See* 69 Fed. Reg. 77326, 77339 (December 27, 2004). The regulations do not provide exemptions for entities whose business operations continue on weekends and holidays. In the present case the evidence in this matter was that the petitioner failed to post the notice for ten consecutive business days. USCIS is bound to follow the regulation as written that

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<sup>8</sup> *See* 20 CFR § 656.1; *See also* the Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); *see also* Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).

requires notice of posting for ten business days at the facility or location of the employment. *See* 20 CFR § 656.10(d)(1)(i) and (ii). *See also* <<http://www.foreignlaborcert.doleta.gov/faqanswers.cfm>> as accessed January 23, 2009.<sup>9</sup>

Therefore, the director correctly interpreted the PERM regulation duration requirement for the posting notice. Thus, the AAO affirms the director's decision that the petitioner has failed to submit a regulatory-prescribed posting notice that conforms to the regulatory requirements for Schedule A, Group I nurse petitions.

*The regulation at 20 C.F.R. § 656.10(d)(1)(ii): In-house media publication.*

The petition as filed contained no documentary evidence that notice of filing was published in any in-house media (meaning within the petitioner's own organization) according to the regulation at 20 C.F.R. § 656.10(d)(1)(ii). In pertinent part, the regulation requires, "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."

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director 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 AAO affirms the director's decision that the petitioner has failed to submit a regulatory-prescribed posting notice that conforms to the regulatory requirements for Schedule A, Group I nurse petitions.

The evidence submitted does not demonstrate that a notice of filing was completed in accordance with 20 CFR § 656.10(d)(1)(i) and (ii) for 10 consecutive business days. Further the evidence submitted does not demonstrate that notice of filing was published in any in-house media according to the regulation at 20 C.F.R. § 656.10(d)(1)(ii).

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

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<sup>9</sup> Specifically, DOL's FAQs give examples of how to calculate "time periods as outlined by the regulation."

If the Notice of Filing is posted on Thursday, June 28, 2007, the posting dates must be June 28 – July 12, and the earliest filing date permissible is Saturday, August 11, 2007, (the notice of filing must be posted for "ten consecutive *business* days and, therefore, neither weekends nor the Fourth of July are counted).

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benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.