



U.S. Citizenship  
and Immigration  
Services

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

PUBLIC COPY

B6

FILE:

LIN 06 251 53395

Office: NEBRASKA SERVICE CENTER

Date: NOV 06 2009

IN RE:

Petitioner:  
Beneficiary:

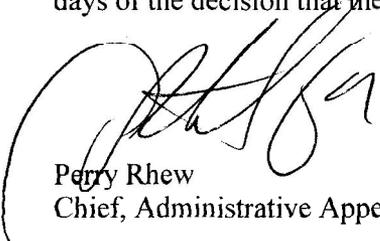
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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).

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center (director), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a hospital, and seeks to employ the beneficiary permanently in the United States as a registered nurse, a professional or skilled worker pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(2), and 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 nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(3)(ii).

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the 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.

Based on 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file Form I-140, “accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien’s occupation qualifies as a shortage occupation within the Department of Labor’s Labor Market Information Pilot Program.”<sup>1</sup> The priority date of any petition filed for classification under section 203(b) of the Act “shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [U.S. Citizenship and Immigration Services (USCIS)].” 8 C.F.R. § 204.5(d).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer’s completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer’s employees as set forth in 20 C.F.R. § 656.10(d).

---

<sup>1</sup> On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

Also, according to 20 C.F.R. § 656.15(c)(2), aliens who will be permanently employed as professional nurses must have: (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination; or (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment; or (3) that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

On August 2, 2007, the director denied the petition because the petitioner failed to properly post the position in accordance with 20 C.F.R. § 656.10(d)(1). Specifically, the director found that the petitioner failed to post the notice for the requisite ten consecutive business days to allow notice to prospective U.S. workers. The director also found that the notice was not posted between 30 and 180 days before the petition was filed as required. In addition, the director noted that the petitioner failed to provide evidence that notice of the position was provided in its in-house media as the regulation requires.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

The record shows that the appeal is properly filed, timely and makes an allegation 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.

Preliminarily, counsel argues that the director erred in not issuing a Request for Evidence or Notice of Intent to Deny “as required by” 8 C.F.R. § 103.2(b)(8). The cited regulation requires the director to request additional evidence in instances “where there is no evidence of ineligibility, and initial evidence or eligibility information is missing.” *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. Here, the posting did not comply with the regulations and the petition demonstrated ineligibility on its face. In the instant case, counsel has not stated what evidence could have been produced to alter the plain facts that the petitioner’s posting notice was not in compliance with the regulations and therefore immediately deniable without the need to request additional evidence.

With respect to the issue of whether the notice was posted for ten consecutive business days, on appeal, counsel asserts that a “business day” for a hospital is every day of the week, weekends and holidays included, that the period of time that the notice was posted should include every day of the week instead of the traditional work week. Also, counsel argues that the 30 to 180 days should be calculated from the first day the notice was posted to the day the petition was filed, which, in this case, was 39 days. Counsel also provided a letter from [REDACTED], a human resources

---

<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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

representative with the petitioner, which stated that notice of the position was provided on the petitioner's website during the summer of 2006, but that a copy of that posting was no longer available due to the passage of time. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

A petitioner must establish eligibility at the time of filing. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

One of the requirements to meet Schedule A eligibility is that the petitioner is required to post the position in accordance with 20 C.F.R. § 656.10(d), which provides:

- (1) 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:

- (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 . . . 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.

...

- (3) The notice of the filing of an Application for Permanent Employment Certification shall:

- (i) State that 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.

(6) If an application is filed under the Schedule A procedures at § 656.15. . . the notice must contain a description of the job and rate of pay and meet the requirements of this section.

Additionally, section 212 (a)(5)(A)(i) of the Act states the following:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified . . . that

- (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

Fundamental to these provisions is the need to ensure that there are no qualified U.S. workers available for the position prior to filing. The required posting notice seeks to allow any person with evidence related to the application to notify the appropriate DOL officer prior to petition filing. *See* 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).

The posting notice is deficient as the certification states that it was posted from June 29, 2006 to July 12, 2006, which is not for the required time period of ten consecutive business days as July 4 would have been a federal holiday.<sup>3</sup> Counsel's argument that the notice was posted for ten consecutive

---

<sup>3</sup> The DOL website in its "Frequently Asked Questions (FAQs)" contains a definition relevant to the calculation of "ten consecutive business days:"

**Time Periods** are the number of days during which an activity must take place. Examples of time periods are the requirement a job order must be placed for 30 days and the requirement that a Notice of Filing must be posted for ten consecutive business days. When counting a time period, both the start date and end date are included in the count. Thus, if a job order is on the State Workforce Agency web

business days attempts to impose an individualized definition for the terms involved instead of viewing the regulation as one which encompasses every industry and business. Although a hospital may operate on a full-time basis, not taking time off for weekends or holidays, the regulations were written to cover all businesses, not just hospitals as 20 C.F.R. § 656.10 posting provisions also relate to the general labor certification process. As such, the regulations must be applied consistently to applicants with no regard as to their individual operating procedures.

On appeal, counsel includes a copy of Black's Law Dictionary, Fifth and Sixth Editions and states that the director erred in using Black's Law Dictionary in order to define "business day" as that term does not appear in the publication. We agree that the Fifth and Sixth Editions do not contain a definition of the term "business day," however, the Eighth Edition of Black's Law Dictionary does contain a definition of the term: "**business day**. A day that most institutions are open for business, usu. a day on which banks and major stock exchanges are open, excluding Saturdays and Sundays." On appeal, counsel states that "[i]t is common knowledge that banks and stock exchanges are open for business fewer hours per day, and fewer days out of the year, than many – if not most – employers in the United States." First, counsel provides no citation or other support for his assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I. & N. Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I. & N. Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I. & N. Dec. 503, 506 (BIA 1980). Second, the number of hours per day that the bank or stock exchange is open is immaterial to the

---

site from February 1, 2007, through March 8, 2007, February 1st, is day 1, February 2nd, is day 2, March 2nd, is day number 30, March 8th, is day number 36.

As another example, the regulation requires a 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 4th, is day 5; the following Monday, May 7th, is day 6; and Friday, May 11th, is day 10. May 11th, is the last day of this time period and is therefore defined as the event and is not counted when calculating the 30 day restriction prior to filing timeline. To calculate the 30 day timeline, May 12th, is day 1, May 13th, day 2, May 23rd, day 12; May 31st, day 20; and June 10th, is day 30. The application can be filed on June 10, 2007.

Examples of the earliest filing date permissible for a particular Notice of Filing posting or job order placement date are as follows:

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).

See <http://www.foreignlaborcert.doleta.gov/faqanswers.cfm#timeframes5> (accessed October 7, 2009).

definition given and there would be no reason to include the modifier “business” if the regulation intended for any day to be counted in the calculation. Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). We are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As the period of time between June 29, 2006 and July 12, 2006 included only nine consecutive business days and not the required ten, the petitioner did not comply with the requirements of 20 C.F.R. § 656.10(d)(1)(ii) and this petition may not be approved.

To be eligible for a Schedule A petition, as set forth above the petitioner would need to have posted the position pursuant to 20 C.F.R. § 656.10(d)(3)(iv) 30 to 180 days prior to the August 7, 2006 filing, and have met the other requirements of 20 C.F.R. § 656.10(d). The notice was first posted on June 29, 2006 and removed on July 12, 2006. On appeal, counsel argues that the 30 to 180 days should be calculated from the date that the notice was first posted as that was the date that notice was provided to the petitioner’s employees.<sup>4</sup> If we were to accept counsel’s argument that notice

---

<sup>4</sup> Again, we refer to the DOL guidelines:

**Timelines** are the number of days prior to or after a required event. When counting a timeline, the day of the event is not counted, the next day is counted as one, and the last day is included in the count. Thus, when determining the required 30 day timeline prior to filing an application for a newspaper advertisement placed on Thursday, February 1, 2007, the Thursday is not counted because it is the day of the event. Friday, February 2nd, is counted as day 1 of the timeline; Saturday, February 3rd, day 2; etc., up until Saturday, March 3rd, which is day number 30. The application can be filed on the 30th day after the event, Saturday, March 3rd, but not before. The same result is achieved if counting back from the day of the filing. If the application is filed on Saturday, March 3rd, the 3rd, is not counted because it is the day of the event. Friday, the 2nd, becomes day 1, Thursday, the 1st, is day 2, back to February 1st, the 30th day. Under the limitation precluding filing in the 30 days prior to the date of filing, if an application was filed on March 3, 2007, a newspaper or national journal advertisement could have been placed as late as February 1st, but no later.

•••

As another example, the regulation requires a 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<sup>th</sup> is day 5; the following Monday, May 7<sup>th</sup>, is day 6; and Friday, May 11<sup>th</sup>, is day 10. May 11<sup>th</sup>, is the last day of the time period and is therefore defined as the event and is not counted when calculating the 30 day restriction prior to filing timeline. To calculate the 30 day timeline, May 12<sup>th</sup>, is

occurred at the moment the posting was placed in the common area, the requirement that the posting remain in the common area for at least ten days would be superfluous and an employer could place the posting in the common area for a very short amount of time. The regulations clearly contemplate that all of the employer's workers would not see the posting immediately due to different schedules, vacations, or other reasons. 20 C.F.R. § 656.10(d) defines "notice" by stating in subsection (1)(ii) that notice is given by posting the job opportunity for a minimum of ten consecutive business days. In construing this language in harmony with 20 C.F.R. § 656.10(d)(3)(iv) which requires that the notice "[b]e provided between 30 and 180 days before filing the application," the notice must be construed as being the entire period that the job posting is available in the employer's common area. *See K Mart Corp.*, 486 U.S. at 291; *COIT Independence Joint Venture*, 489 U.S. 561; *Matter of W-F-*, 21 I&N Dec. 503. The thirtieth day after the notice was removed on July 12, 2006<sup>5</sup> was August 11, 2006; August 7, 2006, the date the petition was filed, is only 26 days after the posting was removed on July 12, 2006. Accordingly, the posting notice was not completed at least 30 days before filing the application.

Counsel argues that this requirement "cannot be applied fairly and . . . will produce inconsistent and chaotic results" because of the choice of an employer to post the notice for a period longer than ten days. Contrary to counsel's assertion, there is nothing arbitrary about this interpretation and provides a bright-line rule that can be applied consistently with a predictable result. The individual employer's choice of how long the notice period will be beyond the required ten consecutive business days has no bearing upon the application of the requirement that the petition be filed between 30 and 180 days after the notice period has concluded. The AAO is required to follow the regulations as written and the posting provided is not in compliance with the requirements of 20 C.F.R. § 656.10(d). Therefore, the petitioner did not establish that it filed the instant petition between 30 and 180 days after the notice period concluded and this petition may not be approved.

The petitioner submitted a September 30, 2007 letter from [REDACTED] as proof that the petitioner published the job opportunity in its in-house media. She states that notice was posted on the petitioner's website during the summer of 2006 and that the website constitutes in-house media publication as required by 20 C.F.R. § 656.10(d)(1)(ii). This letter does not establish that the petitioner published the instant job opportunity on its website as the rate of pay included on the website was \$21.60 instead of the wage offered on the ETA Form 9089 of \$20.60. The posting notice similarly lists the wrong wage of \$21.60. The posting notice must contain the proper rate of pay. *See* 20 C.F.R. § 656.10(d)(1)(6); *see also* <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#notefile6>.<sup>6</sup>

---

day 1, May 13<sup>th</sup>, day 2, May 23<sup>rd</sup>, day 12; May 31<sup>st</sup>, day 20; and June 10<sup>th</sup>, is day 30. The application can be filed on June 10, 2007.

<http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#timeframes5> (accessed October 7, 2009).

<sup>5</sup> We note that the petition would have been required to have been posted past July 12<sup>th</sup> in order to meet the requirement that it be posted for ten consecutive business days.

<sup>6</sup> *See also* <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#notefile6> (" . . . as long as the

Additionally, the posting notice is defective as it fails to list the proper certifying officer as required by 20 C.F.R. § 656.10(d)(1)(iii). At the time of posting, for an offer in Pennsylvania, the petitioner should have listed the Atlanta National Processing Center at 233 Peachtree Street, N.E., Suite 400.<sup>7</sup> 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).

The petitioner failed to meet the posting requirements as set forth in 20 C.F.R. § 656.10(d). Accordingly, the petitioner has failed to meet the regulatory requirements, which require that the job notice be posted for at least ten consecutive business days and that the notice period end more between 30 and 180 days prior to filing the Schedule A application, and be properly posted within its in-house media.

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.

---

single posting complies with the Department of Labor's regulation for each application (e.g. contains the appropriate prevailing wage information and the Notice of Filing must be posted for 10 consecutive business days during the 30 to 180 day time window prior to filing the application). For instance, separate notices would have to be posted for an attending nurse and a supervisory nurse (e.g. nurses containing different job duties).”)

<sup>7</sup> See FAQ Round 1 at [http://www.foreignlaborcert.doleta.gov/pdf/perm\\_faqs\\_3-3-05.pdf](http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_3-3-05.pdf) (accessed October 9, 2009).