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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: LIN 07 063 52526 Office: NEBRASKA SERVICE CENTER Date: SEP 11 2009

IN RE: Petitioner: [redacted]
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:

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.

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 or reopen, 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 healthcare staffing agency. 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. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 or labor certification) accompanied the petition. The director determined that the petitioner had failed to comply with the Department of Labor (DOL)'s notification requirements and denied the petition accordingly.

On appeal, the petitioner submits additional evidence in order to show that it complied with the regulatory requirements.[1]

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).

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), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be "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."

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). Here, the priority date is December 28, 2006. The proffered wage is $25.75 as set forth in Part G of the ETA Form 9089.

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[1] 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.

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. 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. Therefore these regulations apply to this case because the filing date is December 28, 2006.

The sole issue on appeal in this matter is whether the petitioner posted the notice of the certified position in compliance with the applicable regulations found at 20 C.F.R. Part 656.

The regulation at 20 C.F.R. § 656.10(a)(3) provides that an employer seeking a labor certification for a position under Schedule A must apply in accordance with this section and § 656.15.

The regulation at 20 C.F.R. § 656.10(d) states in pertinent part:

> (1) In applications filed under Section 656.15 (Schedule A), 656.16 (Sheepherders), 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 shall 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.
>
> * * *

(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.
>
> * * *

(6) If an application is filed under the Schedule A procedures at § 656.15, or the procedures for sheepherders at § 656.16, the notice must contain a description of the job and rate of pay, and must meet the requirements of this section.

The regulation at 20 C.F.R. § 656.15 states in pertinent part:

> (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).[2]

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[2] The pre-PERM procedure to post the availability of the job opportunity to interested U.S. workers was set forth at 20 C.F.R. § 656.20(g)(1). Relevant to the notice provided to the bargaining

With the initial filing, the petitioner submitted a copy of the notice of posting with certification of posting from [redacted], which was designated as the beneficiary's first nursing assignment and [redacted] of the petitioner. Neither individual's job title was identified. The date(s) of posting was stated to be from April 21, 2006 to June 6, 2006.

The director denied the petition on April 22, 2008, given that the petitioner's notice of the job opportunity was posted during a period that was not at least 30 days but not more than 180 days *prior* to filing the application on December 28, 2006, as required by 20 C.F.R. § 656.10(d)(3)(iv). Instead, the posting notice submitted was completed more than 180 days prior to the petitioner filing the I-140.

On appeal, the petitioner submits an additional posting notice with posting dates of September 21, 2006 to October 13, 2006, claiming that the previously submitted notice was due to a clerical error. The petitioner's contentions are not persuasive. 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). Further, it is noted that the transmittal letter, dated December 22, 2006, signed by the petitioner's immigration specialist, [redacted] specifically confirms the job posting as dated from April 21, 2006 to June 6, 2006, but fails to discuss any other posting despite the posting purportedly occurring less than sixty days before the letter's date. Additionally, both notice(s) of posting submitted are inconsistent with the terms set forth on the ETA Form 9089. They fail to accurately list the amount of acceptable minimum education as set forth on the ETA Form 9089. The ETA Form 9089 designates only an associate's degree or diploma in general nursing as the minimum educational requirements with no alternate educational requirements specified. The notice of job posting initially provided as well as the one submitted on appeal includes an additional minimum educational alternative of a bachelor of science in nursing.[3]

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representative or, if no bargaining representative, to the employer's employees, the regulation provided in pertinent part:

> (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 shall be posted for at least *10 consecutive days.* The notice shall be clearly visible and unobstructed while posted and shall 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, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

(Emphasis added.)

[3]Additionally, we note that both the posting initially provided as well as the notice of posting provided on appeal, failed to comply with 20 C.F.R. § 656.10(d) as they listed an improper address

In this matter, the AAO concurs with the director's decision that the petitioner's notice of posting the certified position from April 21, 2006 to June 6, 2006 failed to comply with the requirements of 20 C.F.R. § 656.10(d)(3)(iv) because it was posted more than 180 days *before* filing the application and additionally failed to list the proper certifying officer and proper educational requirements. Since the petitioner failed to post the notice in compliance with regulations prior to the filing, the petition is not approvable. 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)). As noted above, the posting notice submitted on appeal is similarly deficient and cannot overcome the basis for denial.

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 at 1002 n. 9.

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.

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ORDER: The appeal is dismissed.

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for the certifying officer. The proper address during the timeframe that the petitioner should have posted would have been:

United States Department of Labor
Employment and Training Administration
Atlanta National Processing Center
Harris Tower
233 Peachtree Street, N.E., Suite 410
Atlanta, GA 30303

See www.foreignlaborcert.doleta.gov/pdf/perm_faqs_3-3-05.pdf.