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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

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**U.S. Citizenship  
and Immigration  
Services**

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**SEP 16 2009**

FILE:

[REDACTED]  
LIN 06 159 50043

Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:  
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:

[REDACTED]

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.

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Acting Director, Nebraska Service Center, denied the preference visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

The petitioner is a medical facility. It seeks to employ the beneficiary permanently in the United States as a registered nurse/staff nurse. The petitioner asserts that the beneficiary qualifies for Schedule A, Group I labor certification pursuant to 20 C.F.R. § 656.5(a). The acting director determined that the petitioner had not established that it had properly posted notice of filing the application for permanent employment certification for the required 10 consecutive business days at the place where it intends to employ the beneficiary and that the petitioner failed to submit documentation showing that the beneficiary has received either a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS), that the beneficiary holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment, or that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). The acting director denied the petition accordingly.

The record shows that the appeal is properly filed and timely. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the acting director's March 6, 2007 denial, the issues in this case are whether the petitioner established that it properly posted notice of filing the application for permanent employment certification and whether the petitioner established that it had submitted the proper documentation for the beneficiary to qualify as a Schedule A petition.

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 or seasonal 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.

On April 28, 2006, the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse. 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 been determined that 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.

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 United

States Citizenship and Immigration Services (USCIS) 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).

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. Relevant evidence submitted on appeal includes a brief submitted by counsel; a copy of 5 U.S.C. § 6103; a copy of the U.S. Office of Personnel Management 2006 Federal Holidays; an offer of employment from the petitioner and medical center memorandum; and a copy of the beneficiary's nursing license from New Jersey. The record also contains a Notice of Job Availability and an Attestation to Additional Job Posting; a copy of the beneficiary's diploma and translation; a grade transcript report for the beneficiary; and a CGFNS certificate for the beneficiary. The record does not contain any other documentation relevant to the issues of whether the petitioner posted notice of filing the application for permanent employment certification at its facility and whether the petitioner submitted the proper documentation for the beneficiary.

The regulation at 20 C.F.R. § 656.10(d)(1) provides in relevant part:

In applications filed under §§ 656.15 (Schedule A), 656.16 (Shepherders), . . . 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 . . . .
- (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. (Emphasis added).

According to the regulation at 20 C.F.R. § 656.10(d)(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.

In this case, the record reflects that the petitioner posted a notice of the filing of the application for permanent employment certification. This notice was dated as being posted from January 2, 2006 to January 13, 2006. 20 C.F.R. § 656.10(d) requires that the notice be posted for ten consecutive business days. The regulation at 29 C.F.R. § 2510.3-102(e) defines a "business day" as "any day other than Saturday, Sunday or any other day designated as a holiday by the Federal Government." This office notes that January 7 and 8 were weekends. The acting director states that January 2, 2006 was a federal holiday, and thus determined 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).

Counsel asserts that USCIS erred in finding January 2, 2006 to be a federal holiday. Counsel asserts that January 1, 2006 was the legal holiday for New Year's day. He notes that as January 1, 2006 fell on a Sunday, January 2, 2006 was treated as a holiday for federal employees for pay and leave purposes. In support of his statements, the record includes a copy of 5 U.S.C. § 6103 listing New Year's Day, January 1 to be a legal public holiday. Counsel also submits a copy of the U.S. Office of Personnel Management list of 2006 Federal Holidays stating that January 1, 2006 (the legal public holiday for New Year's Day) falls on a Sunday. As such, for most Federal employees, Monday, January 2, will be treated as a holiday for pay and leave purposes.

The AAO notes that the regulation at 20 C.F.R. § 656.10(d)(1) mandates that the posting be posted "ten consecutive business days." The AAO agrees with counsel's assertions and finds that the acting director erred in considering January 2, 2006 to be a federal holiday, as the legal public holiday is January 1. Although January 7 and 8 were weekends, the AAO finds that the posting complied with the regulation at 20 C.F.R. § 656.10(d)(1) and was posted for ten consecutive business days.

Beyond the acting director's decision, the AAO notes that there is inaccurate information contained in the notice of filing. 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). However, as the petitioner has not had an opportunity to address these points, we will remand the petition to the director for consideration of the following.

As previously noted, the regulation at 20 C.F.R. § 656.10(d)(3) states in pertinent part:

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.

In the instant case, the petitioner provided incorrect information regarding part two of the above regulation in that it stated that "any person may provide documentary evidence bearing of the application to the: New Jersey Department of Labor, P.O. Box 053, Trenton, NJ 08625 or Regional Certifying Officer, U.S. Department of Labor, Employment & Training Admin., 201 Varick Street, Rm. 755, New York, NY 10014" and not to the appropriate Certifying Officer of the Department of Labor as required. As PERM was implemented in March 2005,<sup>1</sup> the application filing structure was changed. The proper address would be:

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<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).

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

See <http://www.foreignlaborcert.doleta.gov/faqanswers.cfm>.

The petitioner must establish eligibility at the time the Form I-140 was filed. *See* 8 C.F.R. § 103.2(b)(12). The petitioner should have an opportunity to address this point on remand.

As set forth in the acting director's March 6, 2007 denial, an additional issue in this case is whether or not the petitioner established that it submitted documentation showing that the beneficiary has received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); that the beneficiary holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment; or that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). The acting director found that the copy of the beneficiary's Registered Nurse's license is from Pennsylvania while the location of the proposed employment is in New Jersey.

On appeal, counsel submits a copy of the beneficiary's Registered Nurse license from New Jersey. The AAO notes that the record also includes a copy of the beneficiary's Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS) issued on April 19, 2006. As such the AAO finds that the petitioner complied with the regulation at 20 C.F.R. § 656.15(c)(2).

As the petitioner has overcome the issue of the beneficiary's qualifications and the issue of ten consecutive posting days, the petitioner should have an opportunity to address the other defects of the posting as set forth above.

In view of the foregoing, the petition will be remanded to the director. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new decision which, if adverse to the petitioner, is to be certified to the AAO.