

**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

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

**PUBLIC COPY**

B6.



FILE:



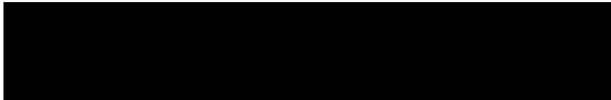
Office: NEBRASKA SERVICE CENTER

Date: FEB 18 2010

LIN 07 035 50125

IN RE:

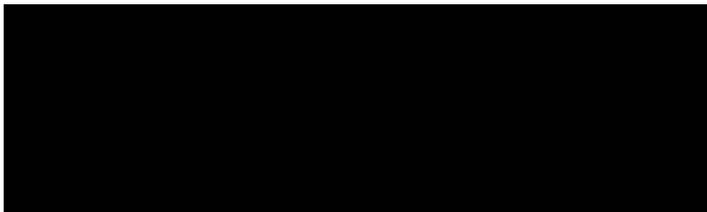
Petitioner:



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).

Berry 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). Here, the petitioner filed the I-140 petition on October 27, 2006.

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

---

<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).

to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d). 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 September 6, 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.<sup>2</sup>

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>3</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.

On appeal, counsel asserts that a "business day" for a hospital is every day of the week, weekends and holidays included, so that the period of time that the notice was posted should include every day of the week instead of the traditional work week. Counsel also asserts that the beneficiary is already employed by the hospital and that no other nurse is available to take her place.

---

<sup>2</sup> The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

For employers with over 100 employees, the ability to pay the proffered wage may be established by the submission of a letter attesting to that fact by the financial officer. We note here that the letter confirming the petitioner's ability to pay the proffered wage was submitted from a human resources officer instead. The letter indicates that the petitioner employs 865 employees.

<sup>3</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).

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 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 . . . the notice must contain a description of the job and rate of pay, and must 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 initially submitted with the petition is deficient as the certification states that it was posted from September 1, 2006 to September 14, 2006, which is not for the required time period of ten consecutive business days as September 4 would have been a federal holiday and September 2, 3, 9, and 10 were weekend days.

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 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. . . .

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/faqsanswers.cfm#timeframes5> (accessed February 16, 2010). Under this definition, holidays and weekend days cannot be counted in the calculation regarding if the petitioner posted its notice for ten consecutive business days. As the time period that the notice was posted by the petitioner includes four weekend days and one holiday, the petitioner failed to demonstrate that it posted the notice for ten consecutive business days as defined by the DOL.

Counsel adds that the petitioner's posting offered greater hourly exposure than a traditional business who posts its notice from 9-5 in a typical office setting. To this end, counsel argues that the traditional business will have afforded 80 hours of exposure in posting a notice during regular business hours over 10 days whereas a hospital that posts a notice for ten days will afford 240 hours of exposure (regardless as to whether those 10 days are during a weekend or holiday) and therefore, the "purpose of the regulations is adequately served." Counsel's argument 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: 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, the petitioner submits two additional notices of the availability of a registered nurse position with the exact same wording as the original notice submitted with the I-140. The only difference between the notices is that the notices submitted with the appeal states that they were posted between July 1, 2006 and July 31, 2006 and from August 1, 2006 to August 31, 2006, respectively. The DOL website in its "Frequently Asked Questions (FAQs)" contains relevant guidance:

**I have multiple positions available for the same occupation and job classifications and at the same rate of pay. May I post a Notice of Filing for the same occupation and job classifications with a single posting?**

Yes, an employer can satisfy Notice of Filing requirements with respect to several positions in each of these job classifications with a single Notice of Filing posting, as long as the 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).

NOTE: At the time of filing the labor certification, the prevailing wage information must not have changed, the job opportunity must remain the same and all other Department of Labor regulatory requirements must be followed.

<http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#timeframes5>.

The posting notices submitted on appeal would overcome the issue the director raised of the ten consecutive business days. However, the posting notices submitted initially and on appeal are deficient as they do not advise those with information about the application to notify the certifying officer with the DOL and fails to provide the address of the appropriate certifying officer.<sup>4</sup> See 20 C.F.R. § 656.10(d)(3). In addition, the posting notices do not contain an accurate description of the job requirements required by 20 C.F.R. § 656.10(d)(6). Specifically, the posting notices do not contain the education requirements, an associate's degree, required for the position as well as the special skills required on the labor certification.<sup>5</sup>

On appeal, counsel states that as this country faces an "acute nursing shortage," denial of this petition would detrimentally affect the petitioner as it would be unable to find another nurse to take her position. In addition, counsel notes that the beneficiary has liquidated assets abroad and relocated her family to this country. In support of these assertions, counsel submits an affidavit from [REDACTED], director of human resources for the petitioner, which states that the petitioner continues to look for qualified nurses to work at its establishment and that a denial of the petition would adversely affect the beneficiary. The petitioner also submitted a policy brief concerning the impact of the nursing shortage on hospital patients. As counsel notes, the nursing shortage is recognized in the regulations by providing for Schedule A occupations, which speeds the labor certification process, however, the requirements specified in the regulations serve an identified purpose which

---

<sup>4</sup> At the time of posting, for an offer in Texas, the petitioner should have listed the Chicago National Processing Center at Railroad Retirement Building, 844 N. Rush Street, 12<sup>th</sup> floor. 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 January 13, 2010); see also *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).

<sup>5</sup> We note that the petitioner did not submit the beneficiary's educational documents to show that she meets the requirements of the labor certification. Those documents, however, were submitted in conjunction with her I-485 application to register permanent residence or adjust status.

may not be ignored. While the petitioner's need for a nurse is not in doubt, the requirements in the regulations ensure that the petitioner's need is adequately weighed against the overall policy concern that U.S. workers not be adversely affected by the filing of a labor certification. *See* 20 C.F.R. § 656.1(a). These requirements termed "technicalities" by counsel protect U.S. workers and require the petitioner to meet established regulations in order to have petitions approved.

Based on the foregoing, the posting notice remains deficient and is not in compliance with 20 C.F.R. § 656.10(d). Therefore, the basis for denial has not been overcome.

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.