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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  
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Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER

Date:

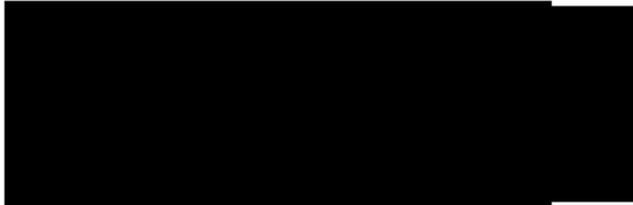
OCT 04 2010

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:

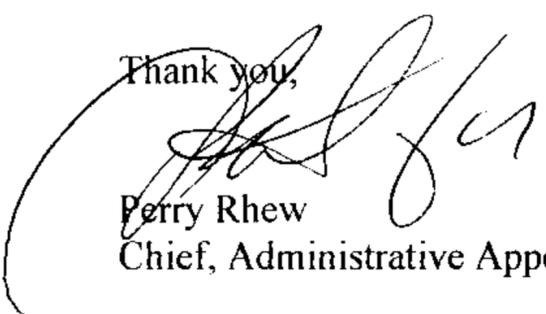


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
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, with a visa classification as a skilled worker pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

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 June 27, 2006, which establishes the priority date. With the petition, the petitioner submitted an ETA Form 9089. On Part H of the ETA 9089, it states that the beneficiary must have an associate's degree in nursing and 24 months of training in nursing. Part H-14 also specifies that the beneficiary must have a current U.S. RN license or be eligible to receive one or a CGFNS certificate. As set forth on Part G of the ETA Form 9089, the proffered wage is \$21.82 per hour.

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

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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).

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). 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 March 28, 2007, the director denied the petition because the petitioner failed to properly post the position in accordance with 20 C.F.R. §§ 656.20(g) and 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 determined that the petitioner had failed to indicate if the publication of the notice had appeared in any in-house media pursuant to 20 C.F.R. 656.10(d)(iii), and had failed to establish that it had the continuing financial ability to pay the proffered wage under 8 C.F.R. 204.5(g)(2).<sup>2</sup>

The petitioner, through counsel, filed a motion to reopen. She submitted a copy of a different notice of posting and documentation related to the petitioner's ability to pay the proffered wage.

On March 27, 2008, the director determined that the grounds for denial had not been overcome and affirmed the denial of the petition. The director rejected counsel's assertion that the seven day per week hours of operation of the hospital satisfied the requirements that the initial notice of filing met the criteria of posting ten (10) consecutive business days. The director further determined that the second notice of filing could not be accepted as it was merely an altered version of the first notice and failed to credibly establish that the petitioner had properly posted notice of filing of the job opportunity.

Additionally, the director determined that the notice of filing failed to properly post the proffered wage as the range of wages stated on the notice began at a rate lower than the prevailing wage of \$21.82 listed on the prevailing wage determination.

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<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.

On appeal, counsel simply states on the Form I-290B, Notice of Appeal or Motion that she will provide evidence that notices were not altered or tampered with. She subsequently submits a copy of a third posting that she claims was used for another beneficiary and also is applicable to this case because the petitioner sponsors numerous registered nurses and there are at any given time posted notices of job(s) opportunity. She also asserts that the petitioner did not have or advertise for positions in in-house media.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).<sup>3</sup>

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (AAO's *de novo* authority recognized by federal courts).

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.

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). To be eligible for a Schedule A petition, as set forth above the petitioner would need to have posted the position pursuant to 20 CFR § 656.10(d)(3)(iv) 30 to 180 days prior to the June 27, 2006 filing, and have met the other requirements of 20 CFR § 656.10(d).

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

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<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).

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. 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 with 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).

As noted by the director, the posting notice initially submitted with the petition (posting notice #1) is deficient as the certification states that it was posted from March 23, 2006 to April 3, 2006, which is not for the required time period of ten consecutive business days as March 25<sup>th</sup>, March 26<sup>th</sup>, April 1<sup>st</sup>, and April 2<sup>nd</sup> were Saturday(s) and Sunday(s) respectively, and could not be counted. If the posting began on March 23, 2006, the end of the required posting period would have been April 6, 2006.

The DOL website in its “Frequently Asked Questions (FAQs)” advises that OFLC has “consistently interpreted business days to mean Monday through Friday except for Federal holidays.”<sup>4</sup>

Under this definition, holidays and weekend days cannot be counted in the calculation 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, the petitioner failed to demonstrate that it posted the notice for ten consecutive business days as defined by the DOL.

Counsel contends that the petitioner’s posting offered greater exposure because a hospital that operates on weekends and is open 24 hours per day will afford the same exposure (regardless as to whether those 10 days are during a weekend or holiday). 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.

Posting notice #1 also lists the position’s salary as “\$20.75-33.73.” The lower end of the range is below the petitioner’s offered wage to the beneficiary of \$21.82 per hour, and below the prevailing wage set by the State Workforce Agency (SWA) of \$21.82 per hour,<sup>5</sup> and thus, fails to accurately

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<sup>4</sup>See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm>. (Accessed September 2, 2010).

<sup>5</sup>The regulation at 20 C.F.R. § 656.40(a) (2006) provided that the employer must request a determination of the prevailing wage from the SWA having jurisdiction over the proposed area of intended employment.

represent the rate of pay and meet the requirements of 20 C.F.R. § 656.10(d)(6).<sup>6</sup> Moreover, it implies that the employer's attestation on page 9 of the ETA Form 9089 is not reliable. The notice providing that the wage range beginning at an amount less than the prevailing wage fails to accurately reflect the employer's promise stated on page 9 of the ETA Form 9089 that the "offered wage equals or exceeds the prevailing wage and that the I will pay at least the prevailing wage."<sup>7</sup> Further, in discussing the use of a salary wage range on DOL's comments on the final rule enacting the PERM process in 2004, indicate that the offered wage range set forth on the ETA Form 9089 was used to clarify that "employers can offer a wage range as well as a specific rate as long as the bottom of the wage range (reflected on the "From" box) is not below the prevailing wage." 69 Fed. Reg. 77326, 77333 (Dec. 27, 2004). Further, referring to page 114 of *Technical Assistance Guide No. 656 Labor Certifications* (TAG), DOL states that "Employers can use a wage range in the required notice. It is longstanding DOL policy that the employer may offer a wage range as long as the bottom of the range is no less than the prevailing rate." 69 Fed. Reg. 77326, 77338 (Dec. 27, 2004).<sup>8</sup> Based on the foregoing, the notice of posting submitted by the petitioner is not consistent with these guidelines because the rate of pay on the notice of posting expresses a range where the bottom is less than the prevailing wage.

Additionally, beyond the decision of the director, the documentation relevant to the notice of posting does not comply with 8 C.F.R. § 656.10(d)(1)(ii) in that there is no statement from the petitioner designating where the notice was posted. Further the notice of posting does not comply with 20 C.F.R. 656.10(d)(3)(iii) because it does not correctly advise of the certifying officer's address. At the time of filing, the job offer extended by the petitioner was in [REDACTED]. According to DOL, the correct address<sup>9</sup> for the certifying officer that the petitioner should have used on the notice of posting was:

[REDACTED]

<sup>6</sup>It is noted that DOL's FAQs with respect to advertising the job offer state that a wage range may be used as long as the bottom of the range is not less than the prevailing wage rate. See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm>.

<sup>7</sup> See also 20 C.F.R. § 656.10(c).

<sup>8</sup>DOL additionally notes that the prevailing wage, which provides the floor of the wage range, must be the prevailing wage at the time the recruitment was conducted for the application for which the employer is requesting certification, not the prevailing wage when the beneficiary was initially hired. 69 Fed. Reg. 77326, 77338. see 20 C.F.R. § 656.40(c) (2006), which provided that "[T]o use a SWA PWD, employers must file their applications or begin the recruitment required by §§656.17(d) or 656.21 within the validity period specified by the SWA."

<sup>9</sup>See DOL FAQs 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 September 2, 2010).

Accordingly, the posting notice #1 and the omission of accompanying documentation that was submitted with the petition was deficient and not in accordance with 20 C.F.R. § 656.10(d)(1)(ii), 20 C.F.R. § 656.10(d)(3)(iii), and 20 C.F.R. § 656.10(d)(6). Further, as noted by the director, the initial posting did not include any evidence from the petitioner whether it had posted the notice of filing using in-house media or whether such media existed. As such, the director was unable to determine if the petitioner had complied with 20 C.F.R. § 656.10(d)(1)(ii). Finally, it is noted that the requirements of the position as stated on the notice represented that an R.N. license was required. This misrepresents the description of the job in compliance with 20 C.F.R. § 656.10(d)(6) and is inconsistent with the requirements of Part H-14 of the ETA Form 9089, which states that the requirements of the position are a current R.N. license in the U.S. or be eligible to receive one or CGFNS certificate.

With respect to posting notice #2, submitted with the petitioner's motion to reopen, we concur with the director that this document appears to be a Xeroxed copy of posting notice #1, complete with the same misspelling of "alient," the same inaccurate salary range, the same results of recruitment, the same signature, and incorrect advisement of the certifying officer's address. The differences are that the "date posted" date has been changed with the middle number of [March 23] to now be 14 [March], and the date of the signature has been altered through "whiting out" the middle number of 23 that has changed to 3 and the first number to now be 4. Additionally, locations of posting have been typewritten in at the bottom of the notice to include the bulletin board and the conference room/reception area. It is unclear if this alteration of a previous notice is a common practice at this petitioner's business operation, however it does raise questions of credibility and reliability of this particular notice of posting. Counsel has not addressed this issue, despite her claim on appeal that evidence would be produced that establishes that no alterations or tampering had been done. The assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The questions of inconsistencies and alterations of posting notice #1 to posting notice #2 in order to comply with regulatory requirements have not been explained or reconciled. For this reason, this notice will not be considered probative of the petitioner's proper posting of the notice of job opportunity in this case. 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, and similar to posting notice #1, posting notice #2 is also not in compliance with 20 C.F.R. § 656.10(d) and would not be acceptable in any event. Posting notice #2 similarly contains deficiencies in misrepresenting the rate of pay, the incorrect advisement of the certifying officer's address, and misrepresenting the job's description in stating requirements that are different from that

described on Part H-14 of the ETA Form 9089. It further lacks any accompanying statement about the existence of in-house media.

Finally, posting notice #3 that counsel submitted on appeal is also inconsistent with the requirements of 20 C.F.R. § 656.10(d)(3)(iv) in that its posting dates are stated as being from June 14, 2006 to June 30, 2006. Although this appears to have been posted for ten consecutive business days, the dates do not indicate that the notice of posting was completed between 30 to 180 days before the filing of the application, as the application was filed June 27, 2006 and the notice of posting should have been completed at least 30 days prior to this date. Therefore, it fails to meet 20 C.F.R. § 656.10(d)(3)(iv). Similar to the other notices of posting, this notice also lacked a correct advisement of the certifying officer's address, and lacked any statement from the petitioner about the existence or posting of the notice in any in-house media, as well as being inaccurate in stating that an R.N. license was required and inconsistent with the job's requirements as set forth on Part H-14. It is not in compliance with 20 C.F.R. § 656.10(d) and cannot support the petition's approval.

Also beyond the decision of the director, it is noted that the petitioner failed to establish that the beneficiary has an associate's degree in nursing or that he has 24 months of training in nursing. The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

In this case, the petitioner has submitted copies of two documents related to the beneficiary's credentials. One is a copy of his Commission on Graduates of Foreign Nursing Schools (CGFNS) certificate issued on November 11, 2005, and the other is a copy of " [REDACTED] Certificate of Nursing issued on June 15, 1977. It indicates that the beneficiary completed a course of instruction in nursing at the " [REDACTED] " in [REDACTED]. The requirements of education and training are separate and distinct. Although 8 C.F.R. § 204.5(l)(2) provides that relevant post-secondary education may be considered as training for the purposes of this provision, the petitioner failed to submit a transcript of marks pertinent to the beneficiary's studies at Giffard Memorial Hospital and failed to establish whether this course of instruction qualifies as an "associate degree" or as 24 months of training. No other third party

verification or evaluation of the beneficiary's educational or training credentials is contained in the record. Therefore the petitioner has not established that the beneficiary acquired the requisite education or training as of the priority date.

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.

**ORDER:** The appeal is dismissed.