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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: **AUG 02 2012**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

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 The decision of the director will be withdrawn, and the matter will be remanded to the director for further consideration and a new decision.

The petitioner describes itself as a health care facility. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹

The director denied the petition because the petitioner failed to post the position properly 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 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.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

On appeal, counsel supplies a brief; a copy of Interpreter Releases for October 18, 2010; and a copy of a notice which the petitioner posted for another position. On appeal, counsel references *Matter of Il Cortile Restaurant*, 2010-PER-00683 (Board of Alien Labor Certification Applications (BALCA) Oct. 12, 2010) to assert that the direct misinterpreted the meaning of “business day,” as used in the Department of Labor’s (DOL) regulations. Counsel asserts that, as clarified in *Matter of Il Cortile*, Saturdays, Sundays and federal holidays may be considered business days if the petitioning entity conducts business on such days. Counsel asserts that, as a hospital, the petitioner was operating during each day of the week during which the notice was posted from June 12, 2007 through June 22, 2007.

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petition is for a Schedule A occupation. A Schedule A occupation is an occupation codified at 20 § C.F.R. 656.5(a) for which DOL has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.*

Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified ETA Form 9089. *See* 8 C.F.R. §§ 204.5(a)(2) and (1)(3)(i); *see also* 20 C.F.R. § 656.15.

If the Schedule A occupation is a professional nurse, the petitioner must establish that the beneficiary has a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). *See* 20 C.F.R. § 656.5(a)(2).

Petitions for Schedule A occupations must also contain evidence establishing that the employer provided its U.S. workers with notice of the filing of an ETA Form 9089 (Notice) as prescribed by 20 C.F.R. § 656.10(d), and a valid prevailing wage determination (PWD) obtained in accordance with 20 C.F.R. § 656.40 and 20 C.F.R. § 656.41. *See* 20 C.F.R. § 656.15(b)(2).

For the Notice requirement, the employer must provide notice of the filing of an ETA Form 9089 to any bargaining representative for the occupation, or, if there is no bargaining representative, by posted notice to its employees at the location of the intended employment. *See* 20 C.F.R. § 656.10(d)(1).

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

- (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:
 - (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 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.

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. 32244 (July 15, 1991).

In the past, the DOL and USCIS interpreted the requirement that the petitioner post the notice required by 20 C.F.R. § 656.10(d) for 10 consecutive business days to exclude Saturdays, Sundays, and federal holidays. However, as noted by the petitioner, BALCA recently concluded in its decision in *Matter of Il Cortile Restaurant* that the purpose of the notice requirement of 20 C.F.R. § 656.10(d)(1)(ii) can be fulfilled when a notice is posted for 10 consecutive days "when employees are on the worksite and [are] able to see the Notice of Filing." *Id.* at 4. BALCA also stated that "[a]s long as an employer has employees working on the premises on a Saturday, Sunday, or holiday, those days are business days for the purposes of complying with the Notice of Filing posting." *Id.* Although BALCA decisions are not binding on USCIS, the AAO has in the past found persuasive the DOL's definition of "business day" as used in 20 C.F.R. § 656.10(d)(1)(ii) for purposes of considering whether a posting notice complies with that regulation.

Consequently, the DOL changed its Frequently Asked Questions (FAQs) on December 21, 2010 for purposes of a Notice of Filing to state the following:

For purposes of posting the Notice of Filing for a permanent labor application, what does the Office of Foreign Labor Certification count as a "business day"?

OFLC has consistently interpreted "business day" to mean Monday through Friday, except for Federal holidays. However, where an employer is open for business on a Saturday, Sunday, and/or holiday, the employer may include the Saturday, Sunday and/or holiday in its count of the 10 consecutive business day period required for the posting of the Notice of Filing so long as the employer demonstrates that it was open for business on those days. Similarly, where an employer is not open for business any day, Monday through Friday, the employer should not include any such days in its count of the 10 consecutive business day period required for the posting of the Notice of Filing.

How does an employer demonstrate that it is open for business?

If an employer is requested on audit or otherwise to demonstrate that it was open for business on a Saturday, Sunday, and/or holiday at the time of posting, the employer must provide documentation which establishes that on those days: 1) its employees were working on the premises and engaged in normal business activity; 2) the worksite was open and available to its clients and/or customers, if applicable, as well as to its employees; and 3) its employees had access to the area where the Notice of Filing was posted.

See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#notefile1> (accessed July 5, 2012).

Accordingly, USCIS also concludes that the purpose of the notice requirement of 20 C.F.R. § 656.10(d)(1)(ii) can be fulfilled when an employer posts the notice for 10 consecutive days when employees are working at the worksite and are able to see the notice, even if those days are Saturdays, Sundays, or federal holidays. Conversely, if an employer is not open for business any day, including a weekday, these will not be counted as business days for purposes of complying with 20 C.F.R. § 656.10(d)(1)(ii). Finally, USCIS will use the guidance provided in the DOL's FAQs as stated above to determine whether a petitioner has established that it was open for business on any particular day for purposes of 20 C.F.R. § 656.10(d)(1)(ii).

In the instant case, the petitioner provided the Notice of Filing which it posted from June 12, 2007 through June 22, 2007. The evidence demonstrates that the Notice was posted for 10 consecutive days. However, as noted above, *Matter of Il Cortile* provides that if a petitioner is open on days other than Monday through Friday and if employees are on the worksite and are able to see the Notice of Filing, the 10 consecutive days may be considered business days. However, the petitioner must demonstrate through documentary evidence that it was open for business on a Saturday and/or Sunday within the posting period as well as on any federal holidays or weekdays falling within the posting period, specifically June 12, 2007 through June 22, 2007. Further, the petitioner must demonstrate that employees were working on the premises for each of these 10 days; that the

worksite was open and available to patients, clients and employees on each of those 10 days; and that the employees had access to the area where the Notice of Filing was posted.

In the instant case, the petitioner has not provided such evidence either in its initial filing or on appeal. On appeal, in an effort to demonstrate compliance with the filing requirement as set forth in 20 C.F.R. § 656.10(d)(1)(ii), the petitioner provided a Notice of Filing which it posted for another position which was contemporaneous with the proffered position. Counsel asserts that the Notice of Filing was posted for the same position as the proffered position. According to the document provided on appeal, the Notice of Filing was posted from June 4, 2007 through June 22, 2007. However, a review of the Notice of Filing reveals that the position advertised on the notice is not the same as the proffered position. For example, though the position described is for a staff nurse, the minimum educational requirement stipulated on the Notice of Filing is an Associate's degree in Nursing. In the instant case, the proffered position requires a Bachelor's degree in Nursing. Therefore, the Notice of Filing provided on appeal does not have the same requirements as the proffered position and cannot be used as evidence that Notice of Filing for the proffered position was made during the period of time in question.

Therefore, the AAO will withdraw the director's decision and remand the case to the director to request and consider evidence demonstrating that the petitioner was open for business during each of the 10 days during which the Notice of Filing was posted at 1030 W. Warner Avenue in Santa Ana, California; that employees were working on the premises for each of the 10 days from June 12, 2007 through June 22, 2007; that the worksite was open and available for patients, clients and employees on each of the 10 days; and that employees had access to the area where the Notice of Filing was posted. The petitioner would not be limited to the types of evidence which it may submit to establish eligibility for the benefit sought. However, it should be noted that evidence which was created contemporaneously with the period of posting would be considered more credible than evidence created after the fact, such as affidavits and letters. Examples of credible evidence in this case could be payroll records, advertisements and promotional materials listing hours and days of operation, invoices, billing records, logs, appointment records and other evidence that regular business activities requiring the presence of employees took place on 10 "business days" within the represented posting period of June 12, 2007 through June 22, 2007. 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 unapprovable 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 of for issuance of a new, detailed decision.