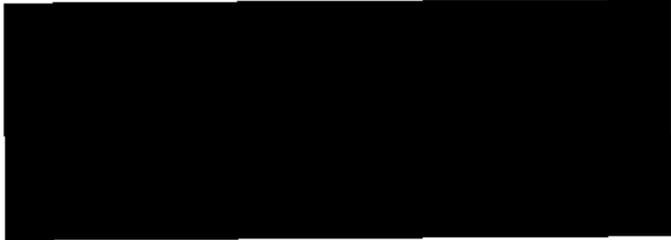


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



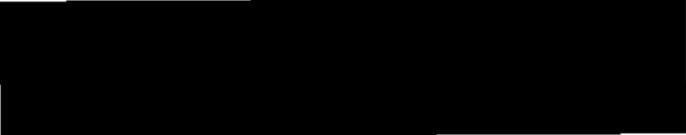
U.S. Citizenship
and Immigration
Services



B6

Date: **DEC 27 2012** Office: NEBRASKA SERVICE CENTER

FILE: 

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:

SELF-REPRESENTED

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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn, and the matter will be remanded for action and a new decision.

The petitioner is a nursing home. It seeks to employ the beneficiary permanently in the United States as a registered nurse pursuant to Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii). The petition is accompanied by an uncertified ETA Form 9089, Application for Permanent Employment Certification. The director determined that the petitioner failed to properly post the position for 10 business days in accordance with 20 C.F.R. § 656.10(d)(1)(ii). Specifically, the director concluded that the notice had not been posted for 10 business days from September 5, 2009 through September 14, 2009, because Monday, September 7, 2009 had been a "major holiday." Therefore, the director denied the petition accordingly. The petitioner filed a timely appeal.

On appeal, the petitioner's director of nursing states that posting notice announcing the proffered job was in fact displayed on a bulletin board at the place of employment for more than 30 days from September 5, 2009 to October 9, 2009. The petitioner provides documentation in support of the appeal.

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 (1)(3)(i), an applicant for a Schedule A position files 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." 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 [United States Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d).

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

- (1) In applications filed under § 656.15 (Schedule A) . . . 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 shall:

- (i) State that 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. . . the notice must contain a description of the job and rate of pay and 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.

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).

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, the Board of Alien Labor Certification Appeals (BALCA), concluded in its decision in *Matter of Il Cortile Restaurant*, 2010-PER-00683 (BALCA October 12, 2010), 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 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 December 18, 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 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).

On appeal, the petitioner's director of nursing states that the posting notice announcing the proffered job was in fact displayed on a bulletin board at the place of employment for more than 30 days from September 5, 2009 to October 9, 2009. The petitioner provides documentation in support of the appeal. Based on the evidence contained in the record, it is concluded that the notice was posted at the facility for a period of time clearly exceeding 10 business days. Furthermore, based upon the decision in *Matter of Il Cortile Restaurant*, the DOL's FAQs and the fact that a nursing home is essentially open and conducting business 24 hours per day, each and every day, the notice was posted at the facility for 10 business days from September 5, 2009 through September 14, 2009. Therefore, the AAO will withdraw the director's decision and remand the case to the director for further action.

However, as there are deficiencies in the record, the appeal cannot be sustained and the petition cannot be approved.

As noted above, the priority date of any I-140 petition filed for classification under section 203(b) of the Act seeking Schedule A designation is the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with USCIS pursuant to 8 C.F.R. § 204.5(d). In the instant case, the Form I-140 was filed on December 29, 2009, and consequently this is the priority date of the ETA Form 9089. Part G. of the ETA Form 9089 does not list the amount of the proffered wage. Part H. of the ETA Form 9089 states that the position requires a bachelor's degree in nursing or foreign equivalent, 24 months of "clinical" training, and 24 months of experience in the offered job or 24 months in an alternate occupation. However, part H., 10-B does not list any alternate occupation. Part K., of the ETA Form 9089 does not list any prior alien work experience for the beneficiary.

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.

The record is absent any evidence demonstrating the petitioner's continuing ability to pay any proffered wage since the priority date of December 29, 2009. As noted above, part G. of the ETA Form 9089 does not list the amount of the proffered wage. Furthermore, the petitioner's posting notice lists the proffered wage as \$26.91 per hour, a confirmation of employment letter from the petitioner to the beneficiary lists a proffered wage of \$27.00 per hour, the Prevailing Wage Request Form lists a proffered wage of \$31.00 per hour, and part 6. #9 of the Form I-140 petition lists the proffered wage as \$880.00 per week. The fact that the record contains conflicting information regarding the amount of the proffered wage causes questions to arise regarding whether a bona fide job opportunity exists. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Consequently, the petitioner must provide an explanation for the discrepancy in the amount of the proffered wage as listed on documents in the record, provide the specific, fixed amount of the proffered wage, and submit evidence of its continuing ability to pay the proffered wage to the beneficiary since the priority date.

Furthermore, in order for the petition to be approved, the petitioner must establish that the beneficiary is qualified for the offered position. Specifically, the petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, United States Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1st Cir. 1981).

The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying the plain language of the [labor certification]." *Id.* at 834.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at *7.

The regulation at 8 C.F.R. § 204.5(g)(1) states, in part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. *If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.*

(Emphasis added). Therefore, USCIS may accept other reliable documentation relating to the beneficiary's employment experience to establish that the beneficiary possesses the experience required by the terms of the labor certification. Such evidence may include statements from former supervisors and coworkers who are no longer employed by the petitioner. USCIS may also consider copies of Forms W-2, Wage and Tax Statement, issued by the prior employer, paychecks, offer letters, employment contracts, or other evidence to corroborate the identity of the employer and the nature and duration of the claimed employment.

The key to determining the job qualifications is found at part H. of the ETA Form 9089. As noted above, Part H. of the ETA Form 9089 states that the position requires a bachelor's degree in nursing or foreign equivalent, 24 months of "clinical" training, and 24 months of experience in the offered job or 24 months in an alternate occupation. However, part H. 10-B does not list any alternate occupation. The record contains the beneficiary's diploma for a bachelor of science in nursing from the [REDACTED] and corresponding transcripts, and a First Aid and CPR Certificate of Training indicating that the beneficiary completed "required training prescribed by the American Safety and Health Institute in accordance with Washington state law [REDACTED] of an unspecified period of time from [REDACTED] (this referenced state of Washington statute does not specify the length of the required first aid and CPR course). Although the beneficiary possesses the foreign equivalent of U.S. bachelor's degree in nursing, the record does not contain sufficient evidence to establish that the beneficiary possessed the 24 months of "clinical" training as required by the labor certification.

At part K. of the ETA Form 9089, which was signed by the beneficiary on August 5, 2009, the beneficiary failed to list any previous employment. However, the record contains a Certificate of Employment dated March 23, 2009 from the [REDACTED] stating following regarding that the beneficiary.

██████████ 38 years old, male, has been a bonafide employee of this institution since January 26, 2009, up to present, currently occupying the position of Senior Medical Examiner with full benefits and privileges. This certification is hereby being issued to the good doctor for United States tourist visa application.

The non-specific Certificate of Employment cannot be considered as sufficient evidence to establish that the beneficiary possessed the required two years of experience in the offered job as of the priority date of December 29, 2009. The Certificate of Employment only attests to three months of employment and does not contain a specific description of the duties performed; thus, it cannot be concluded that the beneficiary is qualified to perform the duties of the proffered position. 8 C.F.R. § 204.5(g)(1). In addition, the fact that beneficiary did not list any employment at part K. of the ETA Form 9089 raises questions whether the beneficiary possesses 24 months of experience in the offered job or 24 months in an alternate occupation as required by the labor certification.

Finally, according to 20 C.F.R. § 656.5(a)(2), aliens who will be permanently employed as professional nurses must (1) have received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS), (2) hold a permanent, full and unrestricted license to practice professional nursing in the state of intended employment, or (3) have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing. While the record contains a letter from the California Department of Consumer Affairs Board of Registered Nursing indicating that the beneficiary had passed the NCLEX-RN examination, this letter cannot be considered as sufficient evidence demonstrating that the beneficiary meets any of the requirements for employment as a professional nurse as listed at 20 C.F.R. § 656.5(a)(2).

Therefore, the petitioner must provide credible evidence to establish that the beneficiary is qualified for the offered position and that he possesses all the required training and experience as listed on the ETA Form 9089.

In view of the foregoing, the director's denial of the petition will be withdrawn. The petition is 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. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision.