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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] OFFICE: CALIFORNIA SERVICE CENTER Date: NOV 20 2004

WAC 04 023 52527

IN RE: Petitioner: [redacted]
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:

[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.

Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a medical services staffing firm, seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted an Application for Alien Employment Certification (ETA-750) with the Immigrant Petition for Alien Worker (I-140). The director determined that petitioner had failed to establish that permanent full-time employment was available to the alien beneficiary as of the time of filing the petition, that the notice of filing the Application for Alien Certification had been properly provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3), and that the record had established that the petitioner's is the alien's prospective U.S. employer.

On appeal, counsel merely states that the petitioner had a contract with a medical service provider as of the time of filing and would provide documentation with an appeal brief. Counsel filed the appeal on May 27, 2004. He indicates on the notice of appeal (Form 1-290B) that a brief and/or evidence would be provided to the AAO within 30 days. As of the date of this decision, more than five months later, no further documentation has been submitted to the record.

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 or seasonal nature, for which qualified workers are not available in the United States.

In this case, the petitioner has filed an I-140 for classification under section 203(b)(3)(A)(i) of the Act as a registered nurse. Aliens who will be employed as professional nurses are listed on Schedule A. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.10 with respect to which the Director of the United States Employment Service 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.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be "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 regulation at 8 C.F.R. § 204.5(d) provides that "[T]he priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of Labor's Labor Market Information Pilot Program shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [Citizenship and Immigration Services (CIS)]."

The regulations in Title 20 of the Code of Federal Regulations also provide specific guidance relevant to the requirements that an employer must follow in seeking certification under Group I of Schedule A. An employer

must file an application for a Schedule A labor certification with CIS. It must include evidence of prearranged employment for the alien beneficiary signified 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 to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.20(g)(3). 20 C.F.R. § 656.22(a) and (b).

The procedure to post the availability of the job opportunity to interested U.S. workers is set forth at 20 C.F.R. § 656.20(g)(1). It provides:

> In applications filed under §§ 656.21 (Basic Process), 656.21a (Special Handling) and 656.22 (Schedule A), the employer shall document that notice of the filing of the application for Alien Employment Certification was provided:
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> (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.
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> (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 shall be posted for at least 10 consecutive days. The notice shall be clearly visible and unobstructed while posted and shall 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, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

Under the regulation, the notice must be posted at the facility or location of the beneficiary's employment. The AAO holds this to mean the place of physical employment. If an application is filed under the Schedule A procedures, the notice must contain a description of the job and rate of pay, must state that the notice is being provided as a result of a filing of an application for a permanent alien labor certification, and must state that any person may provide documentary evidence relevant to the application to the local DOL employment service office and/or to the regional DOL certifying officer. 20 C.F.R. § 656.20(g)(8); 20 C.F.R. § 656.20(g)(3)(ii) and (iii).

In this case, the immigrant visa petition was filed on November 3, 2003. The ETA-750A accompanying the petition states that the position of registered nurse pays $21.18 per hour, requires two years of college culminating in a nursing diploma, as well as a state registered nurse license or evidence of passage of the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination. It also indicates that the alien beneficiary's services will be rendered at the petitioner's same address "or another location depending on patient needs." The petitioner initially submitted a "notice of job opening" for a registered nurse. It indicates that it had been posted from September 3rd until September 19th, 2003 and that the rate of pay was $21.18 per hour. Along with this posting, the petitioner submitted a copy of a prevailing wage determination reflecting that the rate of pay posted for the certified position of registered nurse was based on the Department of Labor's website describing prevailing wages for specified occupations.[1]

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[1] The Department of Labor maintains a website at www.ows.doleta.gov which provides access to an Online Wage Library (OWL). OWL provides prevailing wage rates for occupations based on the location of where the occupation is

On January 17, 2004, the director instructed the petitioner to submit additional evidence pertinent to the petition's eligibility. The director advised the petitioner to submit evidence that the petitioner will be employing the beneficiary to fill a specific vacancy. He instructed the petitioner to provide a copy of the contract between the employer and the alien beneficiary, as well as evidence of the contract between the petitioner and the third-party client where the beneficiary will provide services, including evidence of the number of nurses to be provided and the term of employment. The director also instructed the petitioner to submit evidence that it had properly provided a notice of filing Form ETA-750, to the bargaining representative or had posted the job opportunity at the facility or location of the employment.

In response, the petitioner, through counsel, submitted a copy of its agreement with the alien beneficiary and a copy of a letter dated March 26, 2004, from the petitioner to the alien informing her that she would be employed at the "Alameda Care Center," but that a possible arrangement was being negotiated with the "John Muir Hospital." A professional service agreement, dated April 9, 2004, and containing original signatures from the petitioner and Alameda Care Center was also submitted with the response. Another professional service agreement accepted by the petitioner and the John Muir Medical Center on March 24, 2004 and April 9, 2004, respectively, also accompanied the petitioner's response to the director's request for evidence. In addition, the petitioner submitted a copy of the notice of posting the certified position that was previously submitted with the original petition. Counsel's transmittal letter indicates that it was posted at the petitioner's place of business.

The director denied the petition. The director noted that the petitioner was a nurse staffing agency rather than a direct provider of care and determined that the contracts submitted in support of an existing job offer were not valid as of the time of filing of the I-140, and as such, could not support a finding that a realistic job offer for permanent full-time employment existed at the time of filing the petition. The director also concluded that the petitioner had failed to provide satisfactory evidence that it had properly posted the notice of filing of the ETA 750 and job opening as of the petition's priority date. The AAO concurs.

The regulation at 8 C.F.R. § 103.2(b)(12) states, in pertinent part:

> An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility *at the time the application or petition was filed.* (Emphasis supplied).

In this case, as noted above, the petition must contain prearranged employment for the alien beneficiary signified 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 to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.20(g)(3). 20 C.F.R. § 656.22(a) and (b). As the petitioner does not directly provide medical services, but merely acts as a nurse staffing agency, the director requested evidence that a pre-existing contract for the beneficiary's services existed with a direct medical provider. Both contracts submitted in response to the director's request reflect that they were executed approximately four months after the petitioner filed the I-140. As such, the evidence does not support

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being performed geographically. If a proffered position sets forth basic responsibilities of a nurse under supervision, does not specify an advanced level of training or experience or supervisory duties, it is a Level I position. The position, not the beneficiary's qualifications is the focal point of the analysis. *See* TEGL No. 5-02, published by the Department of Labor.

the conclusion that a realistic job offer of permanent full-time employment existed as of the November 3rd, 2003 priority date.

Counsel asserts on appeal that the petitioner's contract with Alameda Care Center existed as of the time of filing the petition and that only an updated one was supplied in response to the director's request for additional evidence. As no evidence was provided to the record supporting this argument, it need not be further addressed. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel does not submit any other arguments pertinent to the other issues raised in the director's denial.

As noted by the director, the evidence also fails to establish that the job notice was properly posted. The AAO concurs. The petitioner provided no evidence whether a bargaining representative was involved. Further, if the job notice was merely posted at the petitioner's office rather than at the actual location of the alien's employment, as suggested in counsel's transmittal letter accompanying the petitioner's response to the director's request for additional evidence, the petitioner has not complied with the regulatory requirement set forth at 20 C.F.R. § 656.20(g)(1).

The ETA 750A and posted job notice also are problematic when considering the rate of pay set forth as the proffered wage. Relevant to meeting the prevailing wage, the employer must make the following certification: "The wage offered equals or exceeds the prevailing wage determined pursuant to §656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work." *See* 20 C.F.R. § 656.20(c)(2). The rate of pay is determined to meet the prevailing wage rate if it is within 5 percent of the average rate of wages. *See* 20 C.F.R. § 656.40(a)(2)(i).

In this case, as noted before, the ETA 750A does not describe an exact geographical area. Rather it states that the alien will work at the petitioner's location or "another location depending on patient needs." This makes it difficult to determine if the prevailing wage shown on ETA 750A and contained within the job posting is based on an accurate designation of the geographical location where the alien would be working, rather than on some undetermined location to be identified in the future. The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of the U.S. workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. *See* 20 C.F.R. § 656.10. The regulation at 20 C.F.R. § 656.20(c)(2) states that a labor certification application must clearly show that the wage offered meets the prevailing wage rate, and references 20 C.F.R. § 656.40. Therefore a petitioner must specifically state where an alien beneficiary will actually be employed.

Moreover, in this matter, based on the information contained in the record, neither the job posting nor the ETA 750A properly described a rate of pay based on the prevailing wage in November 2003 when the petition was filed, rather than in June 2002, as set forth on the petitioner's copy of the Department of Labor's prevailing wage rate for a registered nurse position. By 2003, according to the Department of Labor's website, the prevailing wage had risen to about $28.59 per hour. The $21.18 per hour rate as stated on the job posting and ETA 750A submitted with the petition, is more than 5% less than the appropriate prevailing wage. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As the petitioner has not submitted evidence that contracts with a

medical service provider existed to support a permanent job offer for the alien beneficiary or that a proper job offer posting had occurred as of the filing date of the Application for Alien Employment Certification and Form I-140, the petitioner has not established eligibility as of the priority date of the petition. Consequently, the petition may not be approved.

The AAO also concurs with the director's observations as to the record's lack of clarity identifying the alien beneficiary's prospective U.S. employer. *See* 20 C.F.R. § 656.3. It is noted that the petitioner's contract with Alameda Care Center does not mention the beneficiary by name. It is also observed that while the petitioner's agreement with the John Muir Medical Center mentions the beneficiary's name, it does not clearly delineate who will be the actual employer of the beneficiary, nor does it specify where the John Muir Medical Center is located. Rather it appears to suggest that John Muir will pay a finder's fee of $10,000 for the petitioner's services as an employment agency in placing the beneficiary at John Muir, rather than clearly designating the petitioner as the full-time permanent employer of the alien beneficiary.

Based on a review of the record, the AAO concludes that the director did not err in denying this petition based on the petitioner's failure to credibly establish the hospital or facility where the alien beneficiary would be employed through an executed contract dated prior to the petition's priority date, failure to establish that it is offering and posted the prevailing wage rate for a registered nurse in a geographical area, and failure to establish that it is the beneficiary's actual U.S. employer.

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.