**U.S. Department of Homeland Security**
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

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U.S. Citizenship
and Immigration
Services

[redacted]

FILE: SRC 01 196 50954 Office: NEBRASKA SERVICE CENTER Date: AUG 0 9 2004

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

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:

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

**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner 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 or professional. The petitioner is a hospital staffing services firm. 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 the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140).

The director determined that the petitioner had not established that it had posted the notice of the filing of the Application for Alien Employment Certification prior to filing the immigrant visa petition (I-140).

On appeal, the petitioner asserts that it mistakenly submitted the wrong notice.

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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 203(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 additionally provides that the "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 (DOL) 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 regulation at 20 C.F.R. § 656.20 further provides that the employer submits documentation that it either has provided notice to the bargaining representative of any of the employer's employees in the occupational classification for which certification of the position is sought or by posting a notice of the job opportunity for at least ten consecutive days at the location of employment. The notice must contain specific information including a description of the job and rate of pay.

The immigrant visa petition was filed on May 11, 2001, thus establishing the priority date in this case. The ETA 750-A accompanying the petition establishes the position of registered nurse as paying $660 per week. The director determined that the petitioner initially failed to submit sufficient evidence showing that it had posted the appropriate notice of the position offered for at least ten consecutive days. On February 14, 2002, the director instructed the petitioner to submit a copy of the notice that it had either provided to the bargaining representative or posted at the location of employment. In response, the petitioner submitted an original "Notice of Filing of Application for Alien Employment Certification" that was signed on February 22, 2002 by the petitioner's recruitment coordinator. Notations at the bottom of the notice state that it was posted on February 25, 2002 and removed on March 6, 2002. It also references a rate of pay different from that set forth in the ETA 750-A. In an accompanying letter, the recruitment coordinator, Patricia David, states that this notice was posted at "our premises" for at least ten consecutive days.

The director denied the petition, determining that the petitioner had failed to provide evidence that it had already posted the notice of the employment opportunity for ten consecutive days prior to filing the immigrant visa petition. As noted above, the petitioner's response to the director's request for evidence shows that it claimed that the position was posted almost a year after the visa petition was filed. The regulation at 8 C.F.R. § 103.2(b)(12) provides that a petition shall be denied where evidence submitted in response to a request for initial evidence does not establish eligibility at the time the application or petition was filed. Based on this evidence, the director properly determined that the petitioner had not established eligibility for approval as of the priority date of May 11, 2001.

It is also noted that the record contains another copy of a notice of filing that was signed by "Elizabeth Tonkin," on behalf of the petitioner. This notice states that it was posted on March 5, 2001 and removed on March 16, 2001. Its rate of pay is the same as that given on the ETA750-A, but there is no confirmation that it was posted in the location of the intended employment, the JFK Medical Center in Atlantis, Florida, rather than at the administrative offices of the petitioner.

On appeal, the petitioner states that the wrong job posting was submitted to the record, referring to the 2002 posting. The petitioner does not mention the notice signed by Elizabeth Tonkin. In an attached letter, dated June 7, 2002, Patricia David states that:

> . . . we are now submitting, and we most humbly and beg the indulgence of this Appeals Unit, to admit the Notice of Filing of Application for Alien Employment Certification posted on March 1, 2001 and the Certification of Posting dated March 19, 2001, copies of which are herein attached as Annexes "A" and "B", respectively, to form integral parts hereof.

The petitioner, however, only submits one document on appeal. The notation at the bottom of this "Notice of Filing of Application for Alien Employment Certification," reflects March 1st, 2001 as the "date posted." The "date removed" is "March 14, 2002." There is no certification of posting dated March 19, 2001, as stated by Ms. David on appeal. Rather, her signature is dated February 26, 2001. The rate of pay is appears to be slightly different than that listed on the ETA-750A. There is also no indication that this posting was placed at the location of intended employment in Atlantis, Florida rather than the petitioner's Sunrise, Florida location, and there is no indication whether any notice was provided to the appropriate bargaining representative.

Thus, three different postings have been offered to the record for the same position, each raising questions as previously noted. It is the petitioner's burden to resolve any inconsistencies in the record by independent objective evidence. *See Matter of Ho,* 19 I&N Dec. 582, 591 (BIA 1988). It cannot be concluded that the petitioner has satisfactorily or credibly established that it has fully complied with the posting requirements at 8 C.F.R. § 656.20(g).

Beyond the decision of the director, it is noted that the petition is also not approvable because the proffered wage set forth in the application for labor certification does not fall within the prevailing wage rate for the geographical location designated as the place of employment in Atlantis, Florida. Pursuant to 20 C.F.R. § 658.20(c), the prospective U.S. employer in a Schedule A labor certification case must certify that the proffered wage "equals or exceeds the prevailing wage 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). For purposes of review, the wage set forth in the application is acceptable if it is within 5 % of the prevailing wage. 20 C.F.R. § 656.40(a)(2)(i). In this case, the DOL's Online Wage Library (OWL )

provides that for a Level I occupation of a staff registered nurse, such as the one described in the application for labor certification, the prevailing wage in 2001 was $17.39 per hour. The proposed wage offer of $660 per week or $16.50 per hour is slightly short of the necessary amount to be within 5% of the prevailing wage at the time the petition was filed.

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.