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

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 02 244 51387 Office: VERMONT SERVICE CENTER Date:

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

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) 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 professional or skilled worker. The petitioner is a hospital. 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 notice of filing the Application for Alien Certification was not properly provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g).

On appeal, the petitioner, through counsel, submits additional information and asserts that the petitioner satisfied the applicable requirements for the position offered.

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 provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

In this case, the petitioner has filed an Immigrant Petition for Alien Worker (Form 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 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)]." 8 C.F.R. § 204.5(d).

The regulations set forth 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 regulation at 20 C.F.R. § 656.22(c)(2) also states:

> An employer seeking a Schedule A labor certification as a professional nurse (§656.10(a)(2) of this part) shall file, as part of the labor certification application, documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment.[1] Application for certification of employment as a professional nurse may be made only pursuant to this §656.22(c), and not pursuant to §§ 656.21, 656.21a, or 656.23 of this part.

The employer must also comply with the procedure set forth to post the availability of the job opportunity to interested U.S. workers. The regulation at 20 C.F.R. § 656.20(g)(1) 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)

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).

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[1] On October 2, 2002, the Department of Labor advised the Service, now CIS, that because many states accept passage of the National Council Licensure Examination for Registered Nurses (NCLEX-RN), a state licensing examination, it planned to pursue conforming amendments to the regulations at 20 C.F.R. 656.22(C)(2) and advised the Service that it may favorably consider an I-140 petition for a foreign nurse for Schedule A labor certification if a certified copy of a letter from the state of intended employment is submitted showing that the alien has passed the NCLEX-RN examination. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Adjudications, *Adjudication of Form I-140 Petitions for Schedule-A Nurses Temporarily Unable to Obtain Social Security Cards* (December 20, 2002).

In this case, the immigrant visa petition was filed on July 17, 2002. The ETA-750A accompanying the petition establishes that the position of registered nurse pays $24.79 per hour. Along with the petition, the petitioner submitted evidence demonstrating that the alien beneficiary possesses the requisite educational and licensure credentials for the offered position, including a certificate from the CGFNS stating that she passed the qualifying examination on March 8, 1995. Having determined that the petitioner had failed to submit sufficient evidence demonstrating that it had properly provided a notice of filing Form ETA-750, to the bargaining representative or had posted the job opportunity at the employment facility or location of the employment, on January 21, 2003, the director instructed the petitioner to provide such evidence.

In response, counsel submitted a copy of an undated job posting describing 64 openings for registered nurses at the stated rate of pay set forth in the petitioner's Form ETA-750A contained in the record, as well as photocopies of four advertisements describing various nursing positions and inviting interested applicants to come to an "open house" to be held in early 2002. These photocopies indicate that they may have appeared in "Nursing Spectrum" or "Newsday." A fifth advertisement contains descriptions for openings for medical personnel other than registered nurses. Counsel claims in his cover letter, dated January 28, 2003, that the petitioner does not have a union representative and that the job posting was placed on the petitioner's bulletin board on or about August 25, 2002, and remained until September 29, 2002. He also states that the advertisements are copies of notices placed in various newspapers and represent the petitioner's continuous recruitment efforts.

The director denied the petition on June 6, 2003. The director found 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.

On appeal, counsel attaches the previously submitted copy of the undated job posting, copies of statutory provisions applicable to immigrant visa applicants, a copy of letter from the Office of Examinations of the Service, now CIS, dated January 28, 1997, a copy of a 1996 Department of State cable. a copy of a 1996 Department of State cable, and a copy of a memo from the Office of Examinations, *Adjudication of Form I-140 Petitions for Schedule-A Nurses Temporarily Unable to Obtain Social Security Cards* (December 20, 2002). *Supra,* n. 1. Counsel's brief substantially mischaracterizes the content of the director's decision. He states that the director questions "whether the beneficiary is required to present to the Center Director either a CGFNS certificate or proof of having passed the NCLEX (for the State of intended employment) in order to get approval of an I-140 for a registered nurse." The AAO does not find such a rationale within director's decision. Counsel's brief does not directly address the facts in this case because the director never questioned the alien's successful passage of the CFGNS examination. The issue here is whether the petitioner complied with the regulatory requirements in providing notice to a bargaining representative or properly posted the notice of filing of the ETA 750 and job opening. Nothing in the applicable statutory provisions or other documents submitted by counsel suggests that such requirements do not apply to all Schedule A, Group 1 certifications.

On appeal, counsel also asserts that the petitioner mistakenly reported the date of the first posting of the job notice as August 25, 2002, rather than the actual date of June 10, 2002. Counsel states that the petitioner's error is attributable to the fact that the job posting was undated and that there were a number of postings made for permanent resident cases. Counsel now claims that the posting was from June 10, 2002 until September 29, 2002, when it was supposed to be removed. Counsel states, however, that it was never removed. He further maintains that the copies of advertisements were only submitted in order to show the petitioner's need for registered nurses.

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); *See also, Matter of Katigbak,* 14 I&N Dec. 45 (Comm. 1971). In this case, notwithstanding counsel's assurances to the contrary, the record contains no first-hand evidence from the petitioner that the applicable posting was completed for ten consecutive days prior to the visa priority date of July 17, 2002. Evidence of such posting should be submitted with the Application for Alien Employment Certification establishing that an attempt to provide notice to any interested U.S. applicant has been completed. Counsel's assertion on appeal of how the petitioner erred in determining the dates of posting is not persuasive and cannot constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

The AAO concurs with the director's denial of the petition based on the petitioner's failure to provide acceptable evidence, as of the priority date of July 17, 2002, that a notice of filing an application for an ETA-750 and job opportunity had been provided to the bargaining representative, or if no bargaining representative, had been posted in accordance with 20 C.F.R. § 656.20(g)(3). As previously noted, under Schedule A certifications, the petition's filing date establishes the priority date. 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,* at 49.

It is further noted that the petitioner's posting of the registered nurse position does not comply with 8 C.F.R. § 656.20(g)(3)(iii), which, as noted above, requires the employer to state verbatim "that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor." The petitioner's job posting contained in the record advises interested applicants that they may contact the "Personnel Office, the Nurse Recruiter, the Director of Nursing or the New York State Department of Labor" . . . , and therefore does not conform to the regulatory requirement.

Beyond the decision of the director, it is noted that the record contains no evidence of the petitioner's ability to pay the proffered wage pursuant to the requirements of 8 C.F.R. § 204.5(g)(2), which requires a petitioner to establish a continuing ability to pay the proffered wage as of the visa priority date and continuing until the beneficiary obtains lawful resident status.

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.