U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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**PUBLIC COPY**

[redacted]

FILE: WAC-03-174-53267 Office: CALIFORNIA SERVICE CENTER Date: APR 25 2006

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, Chief
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California 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 petitioner had not submitted evidence that notice was posted in accordance with 20 C.F.R. § 656.20(g)(1) and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits a brief statement and additional evidence.[1]

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 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 "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). Here, the priority date is May 20, 2003.

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

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

as set forth in 20 C.F.R. §§ 656.20(g)(3), 656.20(g)(1), and 656.22(a) and (b).

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. *See* 20 C.F.R. §§ 656.20(g)(8), and 656.20(g)(3)(ii) and (iii).

The record of proceeding contains letters from the petitioner and some postings submitted as evidence that a notice of the filing was posted pursuant to the regulation for the instant petition. Counsel submitted a letter from [redacted], Recruitment Director of the petitioner dated May 14, 2003 and the second page of posting with the initial filing. The May 14, 2003 letter stated that the notice was posted in an "unobstructed, conspicuous and clearly visible location at Sutter Medical Center, Sacramento in California. It was posted ongoing." However, the letter did not verify the ten (10) day period during which the notice was posted as required by the regulation at 20 C.F.R. §§ 656.20(g)(1) and (g)(8). The posting notice attached to the May 14, 2003 letter was without title and the pay rate range in the notice starts lower than the proffered wage set forth on ETA 750. Nor did the notice state that it was being provided as a result of a filing of an application for a permanent alien labor certification, and 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 under 20 C.F.R. § 656.20(g)(8) and 20 C.F.R. §§ 656.20(g)(3)(ii) and (iii). The initial filing did not verify that there is a bargaining representative at the petitioning organization.

In response to the director's request for evidence (RFE) dated June 12, 2004, the petitioner submitted a letter from [redacted], Human Resources Director of the petitioner, to [redacted], Labor Representative, California Nurses Association, as the formal written notification of Sutter Auburn Faith Hospital's foreign recruitment and employment activities. The letter was dated August 3, 2004, almost fifteen (15) months after the filing instead of prior to the filing. Therefore, the letter cannot be accepted as evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative. With the letter the petitioner also submitted an updated posting notice signed by [redacted] on August 23, 2004. This updated posting notice contains a lower beginning pay rate than the proffered wage and claims to have been posted "on-going August 2, 2004 to August 16, 2004." Because the notice was posted after the filing and has the wrong pay rate, it does not meet the requirement as set forth in 20 C.F.R. § 656.20(g)(8). *See also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971).

On appeal counsel submits several letters of [redacted] dated April 24, 2003, May 15, 2003, June 6, 2003 September 10, 2003 and October 22, 2003 with attached posting notices verifying the notices were posted and asserts that because of the volume of openings and postings, the petitioner continuously posts notices. Counsel also submits two posting notices signed by [redacted] on August 23, 2004. However, none of Ms. [redacted] letters verifies that a notice was posted at least ten (10) days as required by the regulation at 20 C.F.R. § 656.20(g)(1)(ii). The regulation at 20 C.F.R. § 656.20(g)(1)(i) specifically requires 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 and the notice shall be posted for at least 10 consecutive days in order to qualify for Schedule A benefit.

Because the petitioner failed to post a notice in compliance with 20 C.F.R. § 656.20(g)(8) and the record of proceeding does not contain sufficient evidence that a notice was posted for at least 10 consecutive days prior to filing the petition with appropriate content, any subsequent effort by the petitioner to correct the notice of posting would constitute a material change to the petition. If the petition was not already eligible when the

petition was filed, subsequent developments, such as written notice to the bargaining representative or posting notice in August 2004, cannot retroactively establish eligibility as of the filing date. *Matter of Katigbak,* 14 I. & N. Dec. 45, 49 (Reg. Comm'r 1971). A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *Matter of Izumii,* 22 I. & N. Dec. 169 (Assoc. Comm'r, Examinations 1998).

Therefore, counsel's assertions on appeal cannot overcome the director's decision and evidence submitted on appeal is not sufficient to prove that a notice of the filing was posted for at least ten days prior to filing the instant petition.

Beyond the director's decision, the record does not contain evidence that the petitioner had demonstrated its ability to pay the beneficiary the proffered wages from the priority date to the present.

The regulation 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 in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. 8 C.F.R. § 204.5(g)(2). Here, the priority date is May 20, 2003. The proffered wage as stated on the Form ETA 750 is $28.01 per hour. The evidence in the record of proceeding shows that the petitioner is structured as a nonprofit organization with federal identification number: 94-1156621.

The only documents pertinent to the petitioner's ability to pay the proffered wage in the record of proceeding are Form 990 Return of Organization Exempt From Income Tax for 2002 and the audited Combined Financial Statements of Sutter Health and Affiliates (Sutter Health) as of December 31, 2003, including combined balance sheets, combined statements of operations and changes in net assets, combined statements of cash flows and notes to combined financial statements. However, the petitioner failed to establish its continuous ability to pay the proffered wage from the priority date. The petitioner did not submit any evidence that the petitioner is a dependent affiliate or subsidiary of Sutter Health and that Sutter Health is financially responsible for all of the petitioner's debts and liabilities. Without such evidence the petitioner cannot establish its ability to pay using Sutter Health's financial ability.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER**: The appeal is dismissed.