U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 23 2007

WAC-05-048-53900

IN RE: Petitioner:
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:

[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 is a medical staffing service. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. As required by statute, a Form ETA 750, Application for Alien Employment Certification accompanied the petition. The director determined that the petitioner had not established that it had filed the posting notice for the proffered position as prescribed by 20 C.F.R. § 656.20(g) and (g) (8) and that it failed to demonstrate that it offered the wage to the beneficiary equal to or higher than the prevailing wage. Thus, the director determined that the petitioner had not demonstrated that the position qualified for Schedule A certification, and denied the petition accordingly.

The record shows that the appeal is properly filed timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 17, 2005 denial, the issues in this case are whether or not the petitioner has posted a notice of filing as prescribed by 20 C.F.R. § 656.20(g) and (g) (8) and whether or not the petitioner has established that the beneficiary is offered the prevailing wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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 nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA-750 at Part A) in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. The Application for Alien Employment Certification shall include:

1. Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.

2. Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

The regulation at 20 C.F.R. § 656.20(g)(1) provides, in pertinent part,

> 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:
>
> (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.

> (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).

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[1]. The relevant evidence in the record includes two "Job Opportunit[ies]" with certification dated June 7, 2005, and April 25, 2005, and a list of Client Healthcare Facilities. The record does not contain any other evidence pertinent to the posting.

With the petition, the petitioner did not submit any documents pertinent to the posting. In response to the director's notice of intent to deny (NOID), the petitioner submitted a "Job Opportunity" with a certification from [redacted] (Mr. [redacted], the president of the petitioner dated June 7, 2005 (June 7, 2005 posting notice). The notice posted a job as registered nurse and stated duties of the position, along with minimum requirements, salary offered ($29.00 per hour) and contact information. This notice consisted of a certification from Mr. who stated in pertinent part that: "I certify that the above Internal Recruitment Notice of available position was posted in our company's business office from May 20 to June 6, 2005."

On appeal counsel submits a copy of the same job opportunity with another certification (April 25, 2005 posting notice). The new certification was signed by the same Mr. [redacted] but on April 25, 2005. In this certification, Mr. [redacted] stated that: "I certify that the above Internal Recruitment Notice of available position was posted ion our company's business office and at our Hospital clients' business premises from April 1 to April 15, 2005." Counsel also submits a list of the petitioner's hospital clients for reference.

The petitioner must submit evidence that the job posting was posted for at least 10 consecutive days at the facility or location of the employment in accordance with 20 C.F.R. § 656.20(g)(1). CIS interprets the "facility or location of the employment" referenced at 20 C.F.R. § 656.20(g)(1)(ii) to mean the place of physical employment. In the instant case, the petitioner did not provide information on the facility or location of the beneficiary's employment on the Form ETA 750 and form I-140. However, the director correctly noted that the petitioner is a nursing registry and that the beneficiary would actually be working at healthcare facilities. The place of physical employment would be the healthcare facilities where the beneficiary would perform services as a registered nurse instead of the petitioner's business place. The June 7, 2005 posting notice indicates that the notice was posted in the petitioner's business office, and therefore, the petitioner failed to submit evidence that the notice was posted in accordance with 20 C.F.R. § 656.20(g)(1).

The April 25, 2005 posting notice certifies that the notice was posted in the petitioner's business office and also the petitioner's hospital client facilities. However, the petitioner did not submit any supporting evidence

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[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).

to demonstrate that the same posting notices were posted at every single facility listed on the attached list of the petitioner's hospital clients' facilities. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, neither counsel nor the petitioner explained why the exact same notice was posted at the petitioner's business office but another posted at both the petitioner's business office and the client's facilities, why the petitioner posted the notice at all clients' facilities in April but later posted at its office only, and did not submit the April 25, 2005 posting notice first in response to the director's NOID instead of the June 7, 2005 posting notice. These questions cast doubts on the reliability of the April 25, 2005 posting notice. 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 (BIA 1988). Because of these defects the April 25, 2005 posting notice may be given less weight in the processing.

In addition, the notice had to be posted at least ten consecutive days prior to filing with the appropriate information contained in the notice. The instant petition was filed December 7, 2004. Neither the June 7, 2005 posting notice nor April 25, 2005 posting notice was posted for at least ten consecutive days prior to the filing date. Therefore, the petitioner failed to establish that its posting met the requirements set forth by the regulation. Since the petitioner failed to post the notice in compliance with 20 C.F.R. § 656.20(g)(1) and (g)(8) prior to the filing, any subsequent effort by the petitioner to correct the notice of posting would constitute a material change to the petition. If the petitioner was not already eligible when the petition was filed, subsequent developments cannot retroactively establish eligibility as of the filing date, and cited *Matter of Katigbak, 14 I&N Dec. 45, 49 (Reg. Com. 1971.)*

The second issue is whether or not the petitioner demonstrated that it offered the beneficiary the prevailing wage or higher. The form ETA 750 and Form I-140 indicate that the petitioner offered the beneficiary $29.00 per hour or $1,160.00 per week. On appeal counsel submits the prevailing wage determinations for registered nurses in Los Angeles-Long Beach, CA PMSA, Orange County, CA PMSA Bakersfield CA MSA and San Francisco, CA PMSA evidencing that the proffered wage of $29.00 per hour meets the prevailing wage standard. As previously discussed, in the instant case the petitioner did not specify the location of the beneficiary's employment and the petitioner is a nursing staffing service, and therefore, it would be possible for the beneficiary to work at any facilities in the list of the petitioner's hospital clients facilities. Counsel asserts on appeal that the beneficiary is currently assigned at the Los Angeles County, however, does not submit any evidence to support her assertions. 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). Furthermore, although the petitioner established that the proffered wage met the prevailing wage standard in the Los Angels County area and the other three areas the petitioner provided the prevailing wage determinations, the petitioner still failed to establish that the beneficiary was limited and would continue to be limited to work in these four areas. Therefore, the AAO concurs the director's determination that the petitioner failed to demonstrate that the proffered wage offered to the beneficiary met the prevailing wage standards in all the possible employment locations.

Counsel refers to the director's approval on another petition and suggests to apply the same rule to the instant case and approve the instant petition. However, CIS, through the AAO, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

After a complete review of the regulation and the evidence in the record of proceeding, the AAO concurs with the director's determination that the petitioner failed to submit evidence to establish that it posted the notice in compliance with the applicable regulation and that the proffered wage meets the prevailing wage standards in all possible locations of the beneficiary's employment. Accordingly, the grounds of the denial in the director's June 17, 2005 are affirmed.

Beyond the director's decision and counsel's assertions on appeal, the AAO will discuss another issue of ineligibility in this case which is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. 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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is in this case the date the complete, signed petition (including all initial evidence and the correct fee) is properly filed with CIS. *See* 8 C.F.R.. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the priority date is December 7, 2004. The proffered wage as stated on the Form ETA 750 is $29.00 per hour ($60,320 per year). On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of $5,556,000, and to current have 300 employees.

Relevant evidence in the record includes a letter dated October 25, 2004 from [redacted] Chief Financial Officer (CFO) of the petitioner regarding the financial status of the petitioner. The CFO stated that: "[the petitioner] currently employs an estimated 300 employees and that it has the capacity to pay the proffered wage. Its estimated gross annual income is $5,500,000.00."

However, given the record as a whole and the petitioner's history of filing petitions, we find that CIS need not exercise its discretion to accept the letter from the CFO. CIS records indicate that the petitioner has filed over 30 Form I-140 petitions with the Service Center since 2000. In addition, the petitioner has also filed 7 Form I-129 nonimmigrant petitions. Consequently, CIS must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and

obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. In addition, the gross annual income of $5,500,000 claimed by the petitioner was just sufficient to pay its 300 employees at the level of $18,000 per year. It is doubtful that the petitioner has the ability to pay the proffered wage. Given that the number of immigrant and nonimmigrant petitions, its claimed gross annual income and the number of employees, we cannot rely on a letter from the CFO referencing the ability to pay a single unnamed beneficiary. The record of proceeding does not contain any regulatory-prescribed evidence to establish that the petitioner had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income; or net current assets.

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.