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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

[redacted]

BLO

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 30 2007

WAC 06 018 51346

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b).

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

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 Director, Texas Service Center, denied the preference visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a medical center. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for Schedule A, Group I labor certification pursuant to 20 C.F.R. § 656.5(a). The director determined that the petitioner had not established that it had properly posted notice of filing the application for permanent employment certification at the place where it intends to employ the beneficiary. The director also concluded that the petitioner had not shown that it had published notice of filing an application for permanent employment certification for a registered nurse in its in-house media in accordance with normal procedures used by the petitioner when recruiting, within its organization, for positions similar to that which is the subject of the application. The director denied the petition accordingly.

On February 27, 2007, this office notified the petitioner that it would afford it an opportunity to submit evidence regarding whether it published notice of filing an application for permanent employment certification in its in-house media in accordance with procedures used when recruiting for positions similar to that which is the subject of the application. In response, counsel submitted a letter dated March 23, 2007. The response did not include any evidence or assertions that the petitioner had published notice of filing an application for permanent employment certification in its in-house media.

The record shows that the appeal and counsel's response to this office' notice dated February 27, 2007 are properly filed and timely. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 15, 2006 denial, the two issues in this case are whether the petitioner established that it properly posted notice of filing the application for permanent employment certification at the beneficiary's place of employment and in its in-house media in accordance with procedures used for recruiting employees for positions similar to that which is the subject of the application for permanent employment certification.

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.

On October 21, 2005, the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse. Aliens who will be permanently employed as registered nurses are identified on Schedule A as set forth at 20 C.F.R. § 656.5 as being aliens who hold occupations for which it has been determined that there are not sufficient U.S. 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 U.S. workers who are similarly employed.

An employer shall apply for a labor certification for a Schedule A occupation by filing an ETA Form 9089, Application for Permanent Employment Certification, in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. Pursuant to 20 C.F.R. § 656.15, a Schedule A application shall include:

1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.

2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.10(d).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Given that the instant matter was accompanied by an application for Schedule A designation, the priority date for this petition is the date the ETA Form 9089 was properly filed with CIS on October 21, 2005. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is $24.55 an hour or $51,064 annually.

The AAO takes a *de novo* look at issues raised in the denial of the petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.[1] Relevant evidence submitted on appeal includes counsel's brief , a statement dated February 13, 2007 from [redacted] the petitioner's Assistant Vice-President, Human Resource Management as well as counsel's March 23, 2007 letter submitted in response to this office' notice that the petitioner might submit evidence of having published notice of filing the application for permanent employment certification in its in-house media. Other relevant evidence submitted into the record includes: a statement dated September 28, 2005 signed by [redacted]nder penalty of perjury which indicates that the petitioner posted notice of filing the application for permanent employment certification at Loma Linda University Medical Center; and printouts from the petitioner's website which indicate that on July 31, 2005 the petitioner had published on its website over thirty vacancies for registered nurse positions at its Loma Linda facility. The record does not contain any other documentation relevant to the issue of whether the petitioner posted notice of filing the application for permanent employment certification at its facility or whether it published such notice in its in-house media in accordance with those procedures used to announce the availability of positions similar to the position that is the subject of the application.

The regulation at 20 C.F.R. § 656.10(d)(1) provides in relevant part:

> In applications filed under §§ 656.15 (Schedule A), 656.16 (Sheepherders), . . . the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the Certifying Officer, as follows:
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> (i) To the bargaining representative(s) (if any) of the employer's employees . . . .
>
> (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 must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must 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 locations in the immediate vicinity of the wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a). In

[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).

> addition, **the employer must publish the notice in any and all in-house media**, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used **to distribute notice of the application** in accordance with the procedures used for similar positions within the employer's organization.

(Emphasis added.)

The regulation at 29 C.F.R. § 1903.2(a)(1) states in relevant part:

> Each employer shall post and keep posted a notice or notices, to be furnished by the Occupational Safety and Health Administration, U.S. Department of Labor, informing employees of the protections and obligations provided for in the Act . . . . Such notice or notices shall be posted by the employer in each establishment in a conspicuous place or places where notices to employees are customarily posted. Each employer shall take steps to insure that such notices are not altered, defaced, or covered by other material.

According to the regulation at 20 C.F.R. § 656.10(d)(3):

> The notice of the filing of an Application for Permanent Employment Certification must:
>
> i. State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
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> ii. State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
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> iii. Provide the address of the appropriate Certifying Officer; and
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> iv. Be provided between 30 and 180 days before filing the application.

In this case, the record reflects that the petitioner posted notice of the filing of the application for permanent employment certification at the same [redacted] California facility in which it intended to employ the beneficiary. The record also indicates that the building in which it posted this notice is a different building on the campus of its facility, then the building in which it intended to employ the beneficiary at the facility. In addition, the record indicates that the petitioner has over six-thousand employees and that it posted the notice of filing the instant application where job notices and all manner of official notices to its employees are customarily posted within its facility, namely in the human resources building of its medical center campus. The record reflects that this is a building to which all employees in the facility have access and to which all employees must go to attend to any personnel issues and to view official notices. This office finds that this posting meets the requirements for *posted notices* to the employer's employees as set forth at 20 C.F.R. § 656.10(d)(1)(ii).

The petitioner failed to demonstrate, however, that it published notice of filing the application for permanent employment certification in any and all its in-house media in accordance with the normal procedures used for the recruitment of similar positions in its organization, an additional requirement set forth at 20 C.F.R. §

656.10(d)(1)(ii). In the request for evidence dated August 8, 2006, the director indicated that the petitioner should provide evidence that it published notice of filing the application in its in-house media, whether electronic or printed, in accordance with the normal procedures used in its organization for the recruitment of positions similar to the proffered position. In response, the previous counsel in this case submitted a statement dated October 30, 2006 which indicates that the petitioner published notice of filing the application at its website in accordance with its normal recruitment procedures for registered nurses. Counsel also indicated in that statement that the petitioner had previously submitted documentation of this.

However, the only documentation in the record relating to items published at the petitioner's website, www.healthcaresource.com/lomalinda, are printouts from this website that list registered nurse vacancies and various other vacancy announcements for the petitioner's campus in Loma Linda, California as published on its website. The record contains no evidence that the petitioner ever published notice of filing an application for permanent employment certification for a registered nurse position at this website or in any other of its in-house media.

Thus, in her denial, the director again indicated that the petitioner had failed to provide evidence that it published notice of filing the application using its in-house media in accordance with the procedures used to notify its employees of job opportunities similar to that which is the subject of the application.

On appeal, current counsel as well as the petitioner failed to address this basis of the director's decision to deny the petition. In the letter dated March 23, 2007 submitted in response to this office' notification to the petitioner on February 27, 2007 that it would be allowed to submit evidence of having published notice of filing an application for permanent employment certification, counsel acknowledged that it is the petitioner's normal practice to publish information regarding openings similar to that which is the subject of the petitioner's application for permanent employment certification at its website. However, counsel also indicated in his response that the petitioner never published notice of filing an application for permanent employment certification at this website or in any other of its in-house media. Nothing in the record indicates that the petitioner published notice of filing the application for permanent employment certification in any and all of its in-house media in accordance with the normal procedures used for the recruitment of registered nurses in the petitioner's organization, as required by the regulation at 20 C.F.R. § 656.10(d)(1)(ii).

Should the petitioner assert that the director did not completely develop this as an additional basis of her denial, this office would note that where an application fails to comply with the technical requirements of the law it may be denied by the AAO even if the Service Center or District Office did not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003). The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.