U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 06 2007

EAC 06 020 51504

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

The petitioner is a healthcare 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 Schedule A, Group I labor certification pursuant to 20 C.F.R. § 656.5(a). As required by statute, a Form 9089 Application for Permanent Employment Certification accompanied the petition.

The director determined that the petitioner had not established that it had properly posted the notice of filing the application for permanent employment certification in accordance with the requirements of 20 C.F.R. § 656.10(d)(3)(iv). The director denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact and is accompanied by new evidence. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. The director's decision of denial raised only the issue of whether or not the petitioner has demonstrated that it posted a notice of the proffered position in accordance with the regulations.

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 granting 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.

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 an insufficient number of U.S. workers are able, willing, qualified and available to accept that employment, 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.

The regulation at 20 C.F.R. § 656.10(d)(1) states, in pertinent part,

> In applications filed under §§°656.15 (Schedule A), 656.16 (Sheepherders) and 656.17 (Basic Process), 656.18 (College and University Teachers), and 656.21 (Supervised Recruitment) 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:
>
> (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. Documentation may consist of a copy of the letter and a copy of the Application for Permanent Employment Certification form that was sent to the bargaining representative.

> (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 business 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 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).

Pursuant to 20 C.F.R. § 656.15, a Schedule A application shall include:

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

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;
>
> ii. State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
>
> iii. Provide the address of the appropriate Certifying Officer; and
>
> iv. Be provided between 30 and 180 days before filing the application.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). In the *de novo* context, the AAO considers all evidence properly in the record including evidence properly submitted on appeal.[1]

The Form I-140 petition in this matter was filed on October 24, 2005 and indicates that the beneficiary will be employed at [redacted] which is apparently the address of the petitioner's offices.

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

This statement was apparently made in error. The Form ETA 9089 states that the primary worksite is [redacted]

With the petition the petitioner provided a Notice of Application for Alien Employment Certification. A certification provided with that notice states that it was posted from August 15, 2005 to August 26, 2005 ". . . at the Facility's Bulletin Board . . . ." The facility at which it was posted was not further identified.

On November 22, 2005 the service center issued a notice of intent to deny in this matter. The service center noted that whether the notice of filing had been posted at the location of intended employment was unclear. The service center stated that the petitioner was obliged to demonstrate that the notice was posted at [redacted] for ten consecutive business days between 30 and 180 days prior to filing the instant petition.

In response counsel submitted a letter dated December 19, 2005. In that letter counsel stated,

> Re copy of the notice of posting: as of to date, [sic] petitioner still awaits final word from [redacted] on the matter of whether the above-named beneficiary should be assigned to them. Consequently, the location as to where [sic] the beneficiary will be providing services is not as yet known.

Counsel and the petitioner did not then provide any other indication that the notice of filing was posted in accordance with 20 C.F.R. §§ 656.10(d)(1) and 656.10(d)(3).

On March 28, 2006 the service center issued a request for evidence in this matter. In that request the service center noted that, if the location of intended employment is uncertain, then the petitioner is obliged to post the notice of filing at each of its locations or the locations of clients to whom it provides contract employees.

In response, counsel submitted a new notice of filing, different from the notice the petitioner had previously certified that it had posted. The certification submitted with the new filing states that it was posted ". . . in the intended workplace . . .from [August 15, 2005 to August 26, 2005]. . . ." The petitioner did not further identify the intended workplace. In addition, the petitioner did not explain the discrepancy between the notice it had first indicated that it had posted during that period and the revised notice that it now states it posted.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The director denied the petition on July 24, 2006.

On appeal, counsel submitted a third notice of filing. The third notice was accompanied by a certification from the Director of [redacted] and states that the notice was posed on the [redacted] from March 1, 2006 to March 31, 2006.

Because that period of that posting did not fall within the period from 30 to 180 days prior to the submission of the Form I-140 visa petition in this case, 20 C.F.R. § 656.10(d)(3)(iv) indicates that it cannot be used to support the instant petition. Further, this office notes that counsel stated, in his December 19, 2005 letter that

the petitioner does not know at what location it will employ the beneficiary. As such, that third notice is ineffective pursuant to 20 C.F.R. § 656.10(d)(1), which states that if the petitioner's employees are not represented by collective bargaining[2] the notice must be posted at the location of intended employment.

The second notice of filing was posted within the prescribed period. Again, however, the fact that the petitioner first certified that one notice had been posted, and then certified that a different notice was posted during the same period, raises the suspicion that the petitioner may be producing evidence and backdating it as necessary to appear to have satisfied the regulations. Further, where it was posted is unclear. Finally, as was noted above, the petitioner's counsel has stated that the petitioner does not know where it will employ the beneficiary. For these various reasons the second notice of filing does not satisfy the regulatory requirements set out above.

The first notice of filing, that provided with the petition, suffers from the same deficiencies. Although the petitioner initially stated that the first notice was posted within the statutory period, the petitioner subsequently stated that a different notice was posted. This discrepancy leads this office to question whether any of the notices were ever posted at all. Further, the address at which the notice was posted is unclear. Further still, because counsel indicated that the petitioner does not known where it will employ the beneficiary, where the petition should have been posted in order to comply with the regulations is similarly unclear.

The petitioner has submitted no reliable evidence to show that the petitioner ever complied with the posting requirements of 20 C.F.R. § 656.10(d)(1) and 20 C.F.R. § 656.10(d)(3). The petition was correctly denied on that basis, which has not been overcome on appeal. The petition may not, therefore, be approved, and the appeal will be dismissed.

The record suggests an additional issue that was not addressed in the decision of denial.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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 either 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 the Service.

The priority date of the instant petition is October 14, 2005. The petitioner stated on the Form I-140 visa petition that it employs 12 workers and must therefore demonstrate its continuing ability to pay the proffered wage with annual reports, federal tax returns, or audited financial statements. The petitioner submitted no annual reports, federal tax returns, audited financial statements or any other reliable evidence of its ability to

[2] The record contains no indication that the petitioner's employees are represented in collecting bargaining.

pay the proffered wage. Pursuant to 8 C.F.R. § 103.2(b)(8) the director should have requested competent evidence of that ability.

Because the director did not request evidence of the petitioner's continuing ability to pay the proffered wage, this office will not deny the instant petition based on the petitioner's failure to provide that required evidence. If the petitioner attempts to overcome the instant decision, however, it should, in addition to addressing the basis for the denial and dismissal of the appeal, demonstrate its continuing ability to pay the proffered wage.

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.