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

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PUBLIC COPY

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[redacted]

File: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 17 2008

WAC-05-244-50877

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.

Kevin S. Ponton for
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center ("Director"), denied the immigrant visa petition.[1] The petitioner appealed and the matter is now before the Administrative Appeals Office ("AAO"). The appeal will be remanded in accordance with the guidance below.

The petitioner is a healthcare provider, and seeks to employ the beneficiary permanently in the United States as a registered nurse pursuant to section 203(b)(3) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1153(b)(3).

The regulation at 8 C.F.R. § 204.5(l)(2), and section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provide 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii). For the beneficiary to qualify, the petitioner must show that it has the ability to pay the beneficiary the proffered wage, and that the beneficiary meets the qualifications set forth in the certified labor certification. *See* 8 C.F.R. § 204.5(g)(2).

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the Department of Labor ("DOL") 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.

Based on 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file Form I-140, "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."[2] 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).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced 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. § 656.10(d). Also, according to 20 C.F.R. § 656.15, aliens who will be permanently employed as professional nurses must have: (1) have received a certificate from the Commission on Graduates of Foreign Nursing Schools ("CGFNS"); or (2) hold a permanent full and unrestricted license to practice professional nursing in the state of intended employment; or (3) have passed the National Council Licensure Examination for Registered Nurses ("NCLEX-RN").

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[1] The petitioner initially filed its petition with the California Service Center. The petition was transferred to the Texas Service Center for decision in accordance with new procedures related to bi-specialization.

[2] On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA 9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program ("PERM"), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

Additionally, the petitioner must demonstrate its ability to pay the proffered wage. 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 the case at hand, the petitioner submitted the Application for Permanent Employment Certification, ETA 9089, with the I-140 Immigrant Petition on September 8, 2005, which is the priority date. The petitioner listed the proffered wage on the Form ETA 9089 as $32 per hour for an annual salary of $66,560, based on a 40 hour work week. On the Form I-140 petition filed, the petitioner listed the following information: established: 1986; gross annual income: $7 million; net annual income: $500,000; and current number of employees: 215.

On April 11, 2006, the director issued an RFE for the petitioner to submit: a duplicate copy of Form ETA 9089, which included the exact location where the beneficiary will be employed, the education, and amount of experience required for the position. The RFE additionally requested evidence that the position was posted in accordance with 20 C.F.R. § 656.10(d) to include the work site where the work will be performed, and to indicate where the "company bulletin board" was located. The initial posting submitted listed the company bulletin board as the location for posting. The RFE further requested that the petitioner provide evidence of any and all postings in in-house media, whether electronic or printed in accordance with the petitioner's normal procedures for recruitment of positions similar to that specified on Form ETA 9089.[3] The petitioner responded.

On August 2, 2006, the director denied the petition on the basis that the petitioner failed to properly post the position in accordance with the terms of 20 C.F.R. § 656.10(d)(3)(iv). Specifically, the posting was deficient in that the petitioner failed to allow 30 days to elapse subsequent to posting for interested parties to respond to the notice, prior to filing the Form I-140. The petitioner appealed and the matter is now before the AAO.

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).[4]

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[3] The petitioner provided that it does not normally recruit through in-house media, and, therefore, no electronic media documentation was available.

20 C.F.R. § 656.10(d) does not define "in-house media" or what sources in-house media would comprise. The initial PERM regulation published at 69 Fed. Reg. 77326 provides only that the posting must be "published in any and all in-house media in accordance with the normal procedures used for the recruitment of other similar positions." 69 Fed. Reg. at 77338.

[4] 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

The record shows that the appeal is properly filed, timely, and makes an 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.

One of the requirements to meet Schedule A eligibility is that the petitioner is required to post the position in accordance with 20 C.F.R. § 656.10(d), which provides:

> (1) In applications filed under § 656.15 (Schedule A), § 656.16 (Sheepherders), § 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:
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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 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.
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> (3) The notice of the filing of an Application for Permanent Employment Certification shall:
>
> (i) State that 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.
> . . .
>
> (6) If an application is filed under the Schedule A procedures at § 656.15. . . the notice must contain a description of the job and rate of pay and meet the requirements of this section.

Additionally, Section 212 (a)(5)(A)(i) of the Act states the following:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified . . . that

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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).

(I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

The required posting notice seeks to allow any person with evidence related to the application to notify the appropriate DOL officer prior to petition filing. *See* the Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); *see also* Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).

The petitioner initially submitted a posting, which provided that the position was posted from August 10 to August 26, 2005, and listed that it was posted "on the company bulletin board." The director sent an RFE and requested that the petitioner indicate where the "company bulletin board" was located.

In response to the RFE, counsel provided a revised posting notice. The second posting notice listed that the position was posted from July 7, 2005 to August 26, 2005. Further, counsel indicated that the posting was "posted on the bulletin board in front of the supervisor's office at the job site. Please note that the posting began on the date the Prevailing Wage Determination was issued on July 7, 2005 until August 26, 2005."[5] Further, the petitioner added a note to the posting regarding where it was placed: [on the] "company bulletin board on the main floor by the Supervisor's office at 9620 Fremont Avenue."

Both notices indicate that the posting was completed on August 26, 2005. The petition was then filed on September 8, 2005, or 13 days after completion of the posting notice. The director found that the petitioner failed to comply with of 20 C.F.R. § 656.10(d)(3)(iv), that the notice was not provided between 30 and 180 days before filing the application.

On appeal, counsel provides that the petitioner met the ten consecutive business day posting requirement. As the notice was posted on July 7, 2005, counsel asserts that the tenth consecutive business day would have been July 20, 2005, that the petitioner would then have been eligible to file the application on August 19, 2005 or after, and that the petitioner filed the application on September 8, 2005, or 50 days after the tenth consecutive business day of the posting.[6] Further, counsel provides that the hospital could have provided a

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[5] The Prevailing Wage Request contained in the record shows that the petitioner submitted the request on July 7, 2005, and that a determination was made on August 26, 2005.

[6] The petitioner would not have been able to file on August 19, 2005. 20 C.F.R. § 656.40 specifically sets forth that the petitioner must request a wage and the wage obtained is assigned a validity period. In order to use a prevailing wage determination ("PWD"), "employers must file their [Schedule A] applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA." *See* 20 C.F.R. § 656.40(c). The petitioner must file Form ETA 9089 and Form I-140 with the prevailing wage determination issued by the SWA having jurisdiction over the proposed area of employment. *See* 20 CFR § 656.15(b)(i). A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The PWD determination is dated August 26, 2005, and the petitioner would have needed the PWD in order to properly file the I-140 petition.

posting notice, which stated that the position was posted from July 7 to July 20, 2005, which "would have been acceptable, truthful, correct and complied with 20 C.F.R. § 656.15(b)."

Counsel asserts that CIS is wrong and that the regulation does not provide that 30 days must elapse prior to filing. Counsel provides instead that the "regulations state that an application can be submitted if proper notice was provided between 30 and 180 days before filing the application."

Counsel provides that CIS states 30 days are needed after the last day of posting to provide adequate time for interested parties to provide evidence related to the petition. Counsel terms this a "valid but skewed point." Counsel provides instead that there is no limit to the time period in which interested parties can provide evidence – that they can provide evidence during the posting period, after thirty days, or after the immigrant petition has been approved. He provides, "it is therefore illogical that 30 days must run from the last day of the posting in order to allow for submission of documentary evidence."

The regulation provides that the notice must be posted for at least 10 consecutive business days. The director found that the petitioner had complied with the 10 day requirement. The petition would present a question of how the posting dates should be counted to meet the 20 C.F.R. § 656.10(d)(3)(iv) requirement that the notice be provided between 30 and 180 days before filing the application. The petitioner suggests that the notice, if dated from July 7, 2005, would meet the 10 consecutive business day requirement on July 20, 2005, and could then be filed thirty days later, or after receipt of its prevailing wage determination. CIS considered that the posting would end on August 26, 2005, and that the September 8, 2005 posting would then have been filed 13 days later, and therefore, violate the requirement that the posting be within 30 to 180 days of filing under 20 C.F.R. § 656.10(d)(3)(iv). Instead, CIS considered that allowing 30 days after the posting, the petition should not be filed before September 25, 2005.

DOL has provided guidance to the PERM regulations and posting requirements through issuance of "Frequently asked Questions." *See* http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (accessed March 28, 2008). DOL guidance related to posting notices provides:

> **May I post a Notice of Filing for a permanent labor certification indefinitely?**
>
> Yes, an employer may post a Notice of Filing indefinitely, provided that at the time of filing the permanent labor certification application, the Notice of Filing was posted for at least 10 consecutive business days and those 10 consecutive business days fell within 30 to 180 days prior to filing the application. In addition, the Notice of Filing must contain the correct prevailing wage information, the correct job description and must comply with all other Department of Labor regulatory requirements.

DOL guidance would allow for a continuous posting beyond the requisite 10 consecutive business day time period, and counsel is correct that the posting notice dated July 7, 2005 would meet the requirements of 20 C.F.R. § 656.10(d)(3)(iv). However, there is a discrepancy in posting notices. The petitioner initially submitted a posting notice, which listed the dates of posting as August 10 to August 26, 2005. In response to the RFE request, the petitioner provided a revised posting notice, which listed the dates as July 7, 2005 until August 26, 2005. The reasons for the change in the dates of posting are unclear.

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). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent

objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. at 591-592.

As the petitioner has not had an opportunity to address the issue of the discrepant posting notices, we will remand the petition to the director so that the director may issue a Request for Additional Evidence to allow the petitioner to address the inconsistencies and submit additional evidence. Further, 8 C.F.R. § 204.5(g)(2) provides:

> 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 . . . may be submitted by the petitioner or requested by the Service.

While the petitioner submitted a letter stating that it employed over 100 individuals, as the petitioner has sponsored numerous workers, the director should request additional evidence of the petitioning entity's ability to pay for all sponsored workers. Further, we note that the petitioner on Form I-140 is listed as: Community Extended Care Hospital of Montclair, with an address of 9620 Fremont Avenue, Montclair, CA, and a federal tax identification number of: [redacted]. We note records from the California Business Search Portal show only a registered entity: Community Convalescent Center of Montclair Inc. listed at the same address. *See* http://kepler.ss.ca.gov/corpdata/ShowAllList?QueryCorpNumber=C1377927&printer=yes accessed June 10, 2008. The director should request and the petitioner should provide evidence that the exact petitioning entity has the ability to pay, and should provide or address the issue of whether it does business as, or trades as an entity under a different name. Following issuance of the RFE and upon receipt of all the evidence, the director will review the entire record and enter a new decision,

ORDER: The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.