U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 01 2009

EAC 06 051 50595

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a staffing agency. 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. § 656.5, Schedule A, Group I.

As set forth in the director's denial dated June 27, 2006, the issues in this case are whether or not the notice of filing the Application was provided between 30 and 180 days before filing the Application for Permanent Employment Certification (the Application) in accord with the regulation at 20 C.F.R. § 656.10(d)(3)(iv), and whether or not the posting notice listed the proper wage rate. The director found that the petitioner did not provide a valid notice of filing of the application in the required time frame prior to filing in accordance with the regulation at 20 C.F.R. § 656.10(d)(3)(iv), for the job offered of a registered nurse, or at the proper wage rate as stated in the prevailing wage determination (PWD). Accordingly, the director denied the petition.

Issues in this case are whether or not the notice of filing the Application for Permanent Employment Certification (the Application), was provided between 30 and 180 days before filing the Application in accord with the regulation at 20 C.F.R. § 656.10(d)(3)(iv); whether or not the job offered was that of a registered nurse; and whether or not the notice of filing the Application, that listed a rate of pay of $20.00 per hour complied with the regulation at 20 C.F.R. § 656.10(d)(6).[1]

On appeal, counsel submits a legal brief and additional evidence.

The record shows that the appeal is 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.

The chronology of the filings in this matter is as follows: the petitioner posted notice of filing an Application for Permanent Employment Certification beginning on August 30, 2005 through September 19, 2005 at a wage rate of $20.00 per hour; a PWD was obtained by the petitioner from the State Workforce Agency (SWA) with a validity period of August 15, 2005 to December 31, 2005, stating a prevailing wage of $24.24 for the offered job of registered nurse; a I-140 petition was filed on December 9, 2005, along with a Form ETA 9089 signed and dated by the employer on November 1, 2005; and, the director denied the petition on June 27, 2006.

On the petition, the petitioner claimed to have been established in 1985 and to currently employ 2300 workers. There are no tax returns in the record. The net annual income and gross annual income stated on the petition were $5,455,317.00 and $14,000,000.00 respectively. On the Form ETA 9089, signed by the beneficiary on September 13, 2005, the beneficiary did not claim to have worked for the petitioner.

[1] The Application submitted with the petition referenced a PWD that determined the prevailing rate to be $24.24 per hour, and the petitioner offered a wage of $25.00.

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.

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. A receipt date is assigned upon the proper filing of the petition with the required filing fee. *See* 8 CFR §§ 103.2(a)(1)(d), and, 103.2(a)(7)(i). In this case, the Form I-140 for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse was accompanied by a Form ETA 9089[2] prepared by the petitioner and the beneficiary. 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 determined 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.

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 petition was properly filed with U.S. Citizenship and Immigration Services (USCIS) which in this instance is December 9, 2005.[3]

An employer shall apply for a labor certification for a Schedule A occupation by filing an ETA Form 9089 Application in duplicate with the appropriate U.S. Citizenship and Immigration Services (USCIS) office. Pursuant to 20 C.F.R. § 656.15(b), 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).

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[2] As a preface to the following discussion, new U.S. Department of Labor (DOL) labor certification regulations "PERM" became effective as of March 28, 2005. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). PERM applies to labor certification applications for the permanent employment of aliens filed on or after that date. The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. After March 28, 2005, the DOL Form ETA 750 was replaced by the ETA Form 9089, Application for Permanent Employment Certification. As the I-140 was filed on December 9, 2005, PERM regulations apply to this case.

[3] The notice stated that it was posted on August 30, 2005 and its removal date was indicated as September 19, 2005.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon the appeal.[4]

Relevant evidence in the record includes the following: a DOL ETA Form 9089 dated by the employer on November 1, 2005; a cover letter from counsel dated October 12, 2005; a letter from [redacted], president and owner of the petitioner dated September 2, 2005, offering a wage of $25.00 per hour for the offered position of registered nurse (submitted on appeal); a letter from [redacted], president and owner of the petitioner dated September 2, 2005, identifying the job as a clinical supervisor/registered nurse position (initially submitted); a PWD obtained from the SWA (in this case the Department of Labor, State of New York) with a determination date of August 15, 2005, for the job title registered nurses, skill level 1, stating a prevailing wage of $24.24 per hour; a letter from [redacted], CFO of the petitioner dated August 8, 2005, stating that the petitioner employs 2300 workers; an undated "Notice of Job Availability" from the petitioner with a notice of filing an Application for registered nurse at a rate of pay of $20.00 per hour submitted with the initial petition;[5] a separate attestation by [redacted] as authorized officer and vice president that the petitioner did not have any in-house media either electronic or in print to distribute notice of employment opportunities with the petitioner's organization; a "Nursing Service Agreement" between the petitioner and its customer hospital dated April 1, 2000 with exhibits; the petitioner's reviewed financial statements as of June 30,

[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 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).

Concerning the priority date the regulation at 8 C.F.R. § 204.5(d) states:

> *Priority date.* The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an individual labor certification from the Department of Labor shall be the date the request for certification was accepted for processing by any office within the employment service system of the Department of Labor. The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation within the Department of Labor's Labor Market Information Pilot Program shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with ... [USCIS].

[5] The notice stated that it was posted on August 30, 2005 and its removal date was indicated as September 19, 2005.

2003, and 2004, with exhibits; as well as other documentation concerning the beneficiary's qualifications as well as other documentation.

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 . . . 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...
>
> **(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 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 was used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

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.

* * *

> (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 must meet the requirements of this section.

The director found that the notice of filing an application for permanent employment certification was posted at $20.00 per hour which is less than the prevailing wage on the submitted PWD of $24.24. Since $20.00 per hour is below the prevailing wage of $24.24 per hour, and the offered wage of $25 per hour, the notice stating the lower pay rate, is on it face defective.

On appeal, according to counsel's "Notice to Reopen/Appeal" dated July 24, 2006, the posted notice was a clerical error, and "a proper posted notice was posted."

As additional evidence counsel submits a second undated "Notice of Job Availability" signed by the petitioner. The undated "Notice," or notice of filing an application for permanent employment certification, was for the subject job of registered nurse and listed a rate of pay indicating of $25.00 per hour.[6] There is no explanation from the petitioner or counsel why the first notice at the pay rate of $20.00 was submitted with the petition or when the petitioner discovered that a notice was posted incorrectly.

According to counsel's letter dated July 24, 2006, counsel stated in part: "Please note that in addition to the posted notice with the clerical error, a proper posted notice was posted by the Petitioner listing the proffered wage." It is unclear from counsel's explanatory statement, and the posting notice submitted, whether the "error" in the wage amount was corrected and posted later than indicated, or whether the petitioner posted the second notice simultaneously with the first notice submitted. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Additionally, we note that the posting does not adequately convey an accurate description of the job in compliance with the regulation at 20 C.F.R. § 656.10(d) as it fails to list the required education for the position, and therefore does not contain a full and accurate job description.

The director's decision stated that a proper posting notice was not provided between 30 days and 180 days prior to filing the petition. As the initial posting contained the wrong wage and both postings failed to contain a full and accurate job description, neither posting meets the criteria of an accurate posting made 30 to 180 days prior to filing. Accordingly, the petitioner failed to properly post the notice in compliance with 20 C.F.R. § 656.10(d) and the petition will remain denied on this basis.

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[6] The notice stated that it was posted on August 30, 2005 and its removal date was indicated as September 19, 2005.

The director noted as an additional deficiency content in a letter in which the petitioner described the offered position as a registered professional nurse/clinical supervisor position. The first offer letter of two, both dated September 2, 2005, states in pertinent part:

> "It is my pleasure to offer you the position of a Registered Nurse .... This Clinical Supervisor position will also involve precepting, evaluating and teaching all levels of Nursing Personaal [sic] ..."
>
> * * *
>
> **Assignment:** Preferable Hospitals, Teaching assignments as needed ...

The director stated that the job duties in the offer letter failed to match job duties on Form ETA 9089 and that it does not appear that the petitioner has submitted a proper application for labor certification for the actual position being offered.

On appeal, according to counsel's letter dated July 24, 2006, he stated in part:

> "The clinical supervisor position is not the position offered to the beneficiary. This was an additional clerical error on the employer's letter dated September 2, 2005. The employer has since corrected the letter and has attached it as evidence for this motion/appeal."

The petitioner submitted a second letter on appeal, dated September 2, 2005, which states in pertinent part:

> It is my pleasure to offer you the position of a Registered Nurse with ACCESS Nursing Services of New York. The office is located at 16 East 40th Street, New York, NY, 10017. The position will be in a hospital setting in the New York area. This Registered Nurse position will involves [sic] nursing assessment, hands on nursing care including personal care and medication administration to the patients within Access Nursing affiliated hospitals.
>
> * * *
>
> **Assignment:** Preferable Hospitals, Teaching assignments as needed ...

The petitioner appears to have backdated the letter to comply with the filing requirements, rather than issuing a new letter. Further, the assignment category still references "teaching assignments."

Further, a review of the beneficiary's USCIS Form G-325 and resume in the record describes and states the beneficiary's employment experiences from 1993 to 2005 as "director of media center," "committee of research," "full time instructor," "part time instructor," and "assistant professor," and as nurse from 1987 to 1993. Accordingly, her more recent experience has been as a director,

instructor and as a professor for twelve years, compare to her prior shorter experience as a nurse. The beneficiary not only has a Bachelor and Master of Science in nursing, but also a PhD in nursing awarded by Ewha Women's University, the Republic of Korea, in 1999. Based on the totality of the evidence submitted by the petitioner as found in the record, the petitioner has failed to submit sufficient objective independent evidence to overcome a presumption that the petitioner will employ the beneficiary as a clinical supervisor and not as a registered nurse.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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).

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.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.