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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 23 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), certified the denial of the immigrant visa petition to the Administrative Appeals Office (AAO). The director's decision to deny the petition will be affirmed.

The petitioner claims to be a convalescent home. It seeks to permanently employ the beneficiary in the United States as a registered nurse. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1]

The petition contains a blanket labor certification application 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 U.S. 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 must file a Form I-140, Immigrant Petition for Alien Worker, accompanied by an application for Schedule A designation. The priority date of the petition is October 17, 2006, which is the date the petition was filed with U.S. Citizenship and Immigration Services (USCIS). *See* 8 C.F.R. § 204.5(d).

Schedule A applications must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer's completion of an ETA Form 9089, Application for Permanent Employment Certification, and evidence that the employer has provided appropriate notice of filing the labor certification (Notice) to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d). The petitioner must also obtain a prevailing wage determination (PWD) in compliance with 20 C.F.R. § 656.40 and § 656.41. Also, aliens who will be permanently employed as professional nurses must have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, hold a full and unrestricted license to practice professional nursing in the state of intended employment, or have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). *See* 20 C.F.R. § 656.15(c)(2).

The director denied the petition on September 6, 2007 and dismissed the subsequent motion to reconsider on February 8, 2008. On April 17, 2008, the director reopened the matter to clarify the reasons for the denial of the petition, and certified the matter to the AAO for a final decision.[2]

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[1] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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.

[2] Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1). The regulation at 8 C.F.R. § 103.4(a)(4) states: "*Initial decision.* A case within the appellate jurisdiction of the

The certification sets forth four separate grounds for the denial of the petition. First, the director states that the rate of pay on the Notice, which is stated as "$35.00-$39.00/hr, or prevailing wage whichever is higher," does not comply with 20 C.F.R. § 656.10(d) because the low end of the salary range is less than the $38.24 prevailing wage. Second, the director states that the Notice does not contain the address of the Certifying Officer as required by 20 C.F.R. § 656.10(d)(3)(iii). Third, the director states that the petitioner failed to demonstrate that it complied with the requirement to publish the Notice in any in-house media as required by 20 C.F.R. § 656.10(d)(1)(ii). Fourth, the director states that the petitioner did not identify the specific physical location where the Notice was posted, and concludes that merely attesting that the Notice was posted in a conspicuous place does not permit an opportunity to verify that it was, in fact, posted in compliance with 20 C.F.R. § 656.10(d).

Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states:

> (iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;
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> . . .
>
> (B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations.

In the instant case, the decision does not fall within the exception clause in subparagraph (B) in the regulation quoted above, which pertains only to a denial based upon a lack of a certification by the Secretary of Labor. The decision therefore is within the appellate jurisdiction of the AAO. Therefore, the certification of the denial decision is authorized by the regulation at 8 C.F.R. § 103.4(a)(5).

The Notice requirements are set forth at 20 C.F.R. § 656.10(d). The regulation at 20 C.F.R. § 656.10(d) states, in pertinent part:[3]

> (1) In applications filed under § 656.15 (Schedule A), . . . 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. 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.
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> . . .
>
> (3) The notice of the filing of an Application for Permanent Employment Certification must:
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> (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.
>
> . . .

[3] There is no evidence in the record of the existence of a bargaining representative of the employer's employees in the occupational classification for which certification of the job opportunity is sought. Therefore, 20 C.F.R. § 656.10(d)(1)(i) does not apply to the instant petition.

(6) If an application is filed under the Schedule A procedures . . . the notice must contain a description of the job and rate of pay, and must meet the requirements of this section.

Rate of Pay

In Schedule A cases, the Notice "must contain a description of the job and rate of pay, and must meet the requirements of this section." 20 C.F.R. § 656.10(d)(6). This regulatory language differs from the Notice requirement for standard labor certification cases, which requires the Notice to "state the rate of pay (which must equal or exceed the prevailing wage entered by the SWA on the prevailing wage request form)." 20 C.F.R. § 656.10(d)(4). The regulation at 20 C.F.R. § 656.10(d)(6) does not explicitly require a Notice for a Schedule A case to state a "rate of pay" that exceeds the prevailing wage, nor does it explicitly require that the Notice state the "rate of pay" entered by the State Workforce Agency on the PWD.[4]

Nonetheless, the rate of pay stated on the Notice is based on the offered wage stated at G.1 of ETA Form 9089. On ETA Form 9089, the petitioner must attest that the offered wage equals or exceeds the prevailing wage. The regulation at 20 C.F.R. § 656.10(c) specifies that the employer must attest that the stated offered wage equals or exceeds the prevailing wage determined on the PWD obtained pursuant to 20 C.F.R. § 656.40 and §656.41. This prevailing wage is stated at F.5 of ETA Form 9089.

Therefore, since 20 C.F.R. § 656.10(d)(6) requires that the Notice state the "rate of pay," and since 20 C.F.R. § 656.10(c) requires the petitioner to attest that the offered wage equals or exceeds the prevailing wage, the "rate of pay" stated on the Notice for Schedule A cases must meet or exceed the prevailing wage for the offered position.

The PWD in the record states that the prevailing wage is $38.24 per hour, and the ETA Form 9089 states that the offered and prevailing wages are $38.24 per hour.[5] The petitioner does not dispute that the prevailing wage stated on the PWD is the applicable prevailing wage in this case. Therefore, the rate of pay stated on the Notice must meet or exceed the $38.24 prevailing wage.

In the instant case, the Notice states that the rate of pay is "$35.00 to $39.00/hr, or prevailing wage whichever is higher." A Notice may state the rate of pay as a wage range as long as the bottom of the range is no less than the prevailing wage for the offered position. *See* 69 Fed. Reg. 77338 (Dec. 27, 2004)(citing page 114 of *Technical Assistance Guide No. 656 Labor Certifications*).[6] In denying

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[4] It is noted that the regulation at 20 C.F.R. § 656.15(b)(1) requires Schedule A cases to include a PWD.

[5] The offered wage is also stated at Part 6, Item 9 on Form I-140. In this case, the Form I-140 states that the offered wage is $1,529.60 per week, or $38.24 per hour, which is consistent with the PWD and the Form 9089.

[6] The wage range must also include the offered wage stated at G.1 of ETA Form 9089. Otherwise,

the petition, the director correctly noted that the low end of the wage range is less than the $38.24 prevailing wage listed in the ETA Form 9089.

The fact that the employer added the phrase "or prevailing wage, whichever is higher" to the wage range does not bring the Notice into compliance with 20 C.F.R. § 656.10(d). The purpose of the Notice is to apprise employees at the proposed worksite of the filing of a labor certification for the offered position and to provide an opportunity to provide documentary evidence bearing on the application, including evidence pertaining to wage issues. The employees who are the intended audience of the Notice are highly unlikely to know the prevailing wage for the offered position. If the requirement to state a rate of pay on the Notice that meets or exceeds the prevailing wage could be satisfied by simply adding the phrase "or prevailing wage whichever is higher," it would undermine the purpose of the Notice. Consequently, if, as in this case, the Notice contains a wage range, and the low end of the range is less than the prevailing wage for the offered position, the Notice does not comply with 20 C.F.R. § 656.10(d) even if the employer adds the phrase "or prevailing wage, whichever is higher."

On appeal, counsel claims that the Notice was prepared for multiple registered nurse positions with different levels of complexity, and that is why the bottom of the wage range was lower than the prevailing wage. Although an employer may use one Notice for multiple openings, the Notice must meet all DOL regulatory requirements for each application using that Notice, and one Notice cannot be used for different job classifications within the same occupation.[7]

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the Notice would not state the "rate of pay" as required by 20 C.F.R. § 656.10(d)(6).

[7] The DOL's PERM FAQ states:

> **I have multiple positions available for the same occupation and job classifications and at the same rate of pay. May I post a Notice of Filing for the same occupation and job classifications with a single posting?**
>
> Yes, an employer can satisfy Notice of Filing requirements with respect to several positions in each of these job classifications with a single Notice of Filing posting, as long as the single posting complies with the Department of Labor's regulation for each application (e.g. contains the appropriate prevailing wage information and the Notice of Filing must be posted for 10 consecutive business days during the 30 to 180 day time window prior to filing the application). For instance, separate notices would have to be posted for an attending nurse and a supervisory nurse (e.g. nurses containing different job duties).
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> **NOTE:** At the time of filing the labor certification, the prevailing wage information must not have changed, the job opportunity must remain the same and all other Department of Labor regulatory requirements must be followed.

See http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#notefile8 (accessed June 18, 2010).

Accordingly, for the reasons set forth above, counsel's argument is rejected.

Address of the Certifying Officer

The regulation at 20 C.F.R. § 656.10(d)(3)(iii) states that the Notice must contain the address of the appropriate Certifying Officer.[8] The Notice submitted with the labor certification does not contain a Certifying Officer's address. Therefore, the Notice does not meet the requirements of 20 C.F.R. § 656.10(d)(3)(iii). Counsel's claim that this requirement is only "customary" and has "never been codified" is rejected.

Publication of the Notice in In-House Media

An employer must publish the Notice in any and all in-house media in accordance with its normal recruitment procedures. 20 C.F.R. § 656.10(d)(1)(ii). Documentation of this requirement is satisfied by providing copies of all the in-house media, whether electronic or print, that were used to distribute the Notice. *Id.* If it is not in accordance with the employer's normal recruitment procedures to publish openings for similar positions in its in-house media, then there is no requirement to publish the Notice in any in-house media. There is no requirement in the regulations that the employer state on the Notice itself whether or not the employer published the Notice in any in-house media. A signed statement by the petitioner that the company does not have any in-house media, or that it is not in accordance with its normal recruitment procedures to publish openings for similar positions in its in-house media, may be sufficient.

The petitioner must establish that it has fulfilled its obligations relating to the Notice set forth at 20 C.F.R. § 656.10(d)(1)(ii). In the instant case, the record contains no documentary evidence or

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[8] This requirement is also addressed in the DOL's PERM FAQ, which states:

> **What address must the employer provide on the posted notice of filing?**
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> The employer must provide the address of the appropriate Certifying Officer for the area of intended employment. Addresses for the National Processing Centers and Certifying Officers, including a chart of the states and territories within their jurisdiction, can be found under the section, How to File, above.

See http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#notefile3 (accessed June 18, 2010). *See also*, *Voodoo Contracting Corp.*, 2007-PER-00001 (May 21, 2007)(the Notice must contain the address for the appropriate Certifying Officer); *Tekkote*, 2008-PER-00218 (Jan. 5, 2008)(the Notice must reference the opportunity to contact a Certifying Officer and include the Certifying Officer's address); and *Centro Cultural Chicano, Inc.*, 2008-PER-00053 (Feb. 17, 2009)(the Notice must contain the correct Certifying Officer's address).

employer attestation concerning the publication of the Notice in any in-house media. In addition, counsel did not address this issue on certification.
If there is no evidence in the record relating to whether or not the Notice was published in the petitioner's in-house media, USCIS cannot conclude from the absence of any evidence that the petitioner complied with the regulatory requirements set forth at 20 C.F.R. § 656.10(d)(1)(ii).

Therefore, the petitioner has not established that it satisfied the requirements relating to the publication of the Notice in any in-house media set forth at 20 C.F.R. § 656.10(d)(1)(ii).

Physical Location of the Posting of the Notice

The Notice must be posted in a conspicuous place where the employer's U.S. workers can readily read it on their way to or from their place of employment. 20 C.F.R. § 656.10(d)(1)(ii). Appropriate physical locations for posting the Notice include, *but are not limited to*, the immediate vicinity of the wage and hour notices or occupational safety and health notices. *Id.* Accordingly, the regulations permit the employer to post the Notice in any number of physical locations at the proposed worksite, as long as the Notice is posted in accordance with the aforementioned requirements.[9]

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[9] Regarding the address where the Notice must be posted, the DOL's PERM FAQ states:

> If the employer knows where the Schedule A employee will be placed, the employer must post the notice at that work-site(s) where the employee will perform the work and publish the notice internally using in-house media--whether electronic or print--in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage indicated in the notice will be the wage applicable to the area of intended employment where the worksite is located.
>
> If the employer does not know where the Schedule A employee will be placed, the employer must post the notice at that work-site(s) of all of its current clients, and publish the notice of filing internally using electronic and print media according to the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage will be derived from the area of the staffing agencies' headquarters.
>
> If the work-site(s) is unknown and the staffing agency has no clients, the application would be denied based on the fact that this circumstance indicates no bona-fide job opportunity exists. The employer cannot establish an actual job opportunity under this circumstance. A denial is consistent with established policy in other foreign labor certification programs where certification is not granted for jobs that do not exist at the time of application.

Documentation of the posting of the Notice "may be satisfied by providing a copy of the posted notice and stating where it was posted." *Id.*[10] There is no requirement that the employer state the address or physical location of the posting of the Notice on the Notice itself. An attestation executed by the employer that identifies the address and physical location where the Notice was posted may be sufficient to establish the employer's compliance with 20 C.F.R. § 656.10(d)(1)(ii).

In the instant case, the only evidence of the location of the posting of the Notice is a signed attestation on the Notice itself. The Notice states:

> This Notice is posted clearly in a visible and unobstructed location, for at least ten (10) consecutive days, in a conspicuous location in the workplace, where the employer's U.S. workers can readily read the posted notice, including but not limited to locations in the immediate vicinity of the wage and hour notices.
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> Specific Location Posted: [redacted]

The petitioner must establish that it satisfied the Notice requirements set forth at 20 C.F.R. § 656.10(d)(1)(ii). The Notice does not state the actual physical location of the posting. Instead, it provides the address where the Notice was posted and restates the regulatory language at 20 C.F.R. § 656.10(d)(1)(ii), that the Notice was posted at a location "including but not limited to locations in the immediate vicinity of the wage and hour notices." On certification, counsel did not provide any additional evidence of the physical location where the Notice was posted.

If there is no evidence in the record of the physical location at the proposed worksite where the Notice was posted other than a restatement of the regulatory language at 20 C.F.R. § 656.10(d)(1)(ii), the director does not err in concluding that the petitioner failed to establish that it satisfied the requirements relating to the posting of the Notice.

For the reasons set forth above, the petitioner failed to submit a Notice that would permit an approval of the instant petition and accompanying Schedule A application.

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a

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See http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#notefile9 (accessed August 30, 2010).

[10] Section 22.2(b)(4)(B) of the Adjudicator's Field Manual also states:

> The documentation requirement in support of the I-140 petition may be satisfied by providing a copy of the posted notice and an attestation executed by an authorized official of the employer that identifies the physical location(s) where the notice was posted and the date of publishing.

deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States,* 229 F. Supp. 2d at 1043.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The director's decision in the notice of certification is affirmed. The petition is denied.