(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DATE: JAN 2 4 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Rachel M Timo
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner[1] describes itself as a provider of healthcare staffing. It seeks to employ the beneficiary permanently in the United States as a physical therapist. The petitioner requests classification of the beneficiary as a professional or 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).[2]

The director denied the petition because the petitioner failed to provide notice of the filing of an ETA Form 9089, Application for Permanent Employment Certification, in accordance with 20 C.F.R. § 656.10(d)(1). That is, the petitioner failed to post the notice of the filing of an ETA Form 9089 at all of its client locations.

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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

On appeal, counsel submits a brief; a copy of the minutes from a U.S. Department of Labor (DOL) stakeholder's meeting for December 11, 2006; a copy of the minutes from a DOL stakeholder's meeting for March 15, 2007; a letter from President of dated April 7, 2009; and a document entitled "Guidance for Schedule A Blanket Labor Certifications effective February 14, 2006." On appeal, counsel asserts that the beneficiary works as a roving physical therapist and that the DOL's regulations do not account for such workers with respect to the requirements for the posting of the notice of the filing of Form ETA 9089.

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[1] Form I-140 was filed by However, according to the database maintained by the Michigan Secretary of State, was dissolved on August 22, 2008. The petitioner provided documentary evidence demonstrating that, prior to the dissolution, ownership of the predecessor was transferred to and that is the successor-in-interest to in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

[2] Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petition is for a Schedule A occupation. A Schedule A occupation is an occupation codified at 20 § C.F.R. 656.5(a) for which the DOL has determined that there are not sufficient U.S. workers who are able, willing, qualified, and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.*

Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified ETA Form 9089. *See* 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i); *see also* 20 C.F.R. § 656.15.

If the Schedule A occupation is a professional nurse, the petitioner must establish that the beneficiary has a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). *See* 20 C.F.R. § 656.5(a)(2).

Petitions for Schedule A occupations must also contain evidence establishing that the employer provided its U.S. workers with notice of the filing of an ETA Form 9089 (Notice) as prescribed by 20 C.F.R. § 656.10(d), and a valid prevailing wage determination (PWD) obtained in accordance with 20 C.F.R. § 656.40 and 20 C.F.R. § 656.41. *See* 20 C.F.R. § 656.15(b)(2).

For the Notice requirement, the employer must provide Notice of the filing of an ETA Form 9089 to any bargaining representative for the occupation, or, if there is no bargaining representative, by posted Notice to its employees at the location of the intended employment. *See* 20 C.F.R. § 656.10(d)(1).

The regulation at 20 C.F.R. § 656.10(d)(3) states that the Notice 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.

Notices for Schedule A occupations must also contain a description of the job offered and the rate of pay. *See* 20 C.F.R. § 656.10(d)(6).

In cases where there is no bargaining representative, the Notice must be posted for at least 10 consecutive business days, and it must be clearly visible and unobstructed while posted. 20 C.F.R. § 656.10(d)(1)(ii). 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. *Id.* In addition, the Notice must be published "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." *Id.* The satisfaction of the Notice requirement may be documented by "providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media" used to distribute the Notice. *Id.*

In the instant case, there is no evidence in the record of a bargaining representative for the occupation. Consequently, the petitioner must provide evidence of having posted the Notice of having filed ETA Form 9089 for 10 consecutive business days during the 30 to 180 days prior to the filing of the instant I-140 petition.

With the initial petition submission, the petitioner provided a record of the Notice of filing ETA Form 9089, which was posted for 10 consecutive business days, from June 1, 2007 until June 19, 2007. Further, the petitioner removed the Notice 42 days prior to filing the instant I-140 petition, within the regulatory period for filing. However, according to the evidence, the Notice was posted at one location: "In the lobby at main bulletin board,

In his analysis, the director noted that the petitioner identified itself as "a Provider of healthcare staffing" in Part 5 of Form I-140. Further, in its letter describing the proffered position, dated July 27, 2007, the petitioner describes itself as "your source for healthcare staffing" which "provides healthcare staffing services to our clients in Detroit Metro area, Michigan."

In a section of the DOL's website in which it addresses Schedule A employment, the DOL includes a series of Frequently Asked Questions. The following question was posed to address the requirements for posting Notice of the filing of ETA Form 9089 in instances in which the petitioner is a staffing service which provides nurses and physical therapist to client companies:

> **Where must I post a Notice of Filing for a permanent labor certification for roving employees?**
>
> 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.[4]

Since the petitioner indicated that it is a staffing agency and provides therapists to clients, the director issued a notice of intent to deny (NOID), noting that the posting of the Notice in its headquarters alone would not satisfy the regulatory requirement and that the petitioner did not appear to have complied with the requirements for posting the Notice of the filing of ETA Form 9089 at the place of employment. The director also afforded the petitioner an opportunity to demonstrate that it is an actual healthcare provider and that is the address of the facility at which the beneficiary would be working.

In its response, the petitioner asserted that it "a provider of healthcare services" and that its therapists are "roving employees" who do not provide services at a fixed site, but are assigned on a per-diem basis at individual patients' homes, adult care facilities, or nursing homes and that the DOL regulations do not address such situations.

The petitioner, however, provided no evidence, in the form of business licenses or any other forms of documentation, demonstrating the nature of its business or demonstrating that is an actual healthcare facility at which the beneficiary would be working. Further, the petitioner provided no evidence, in the form of contracts between it and its employees, detailing the nature or conditions for employment or describing the work sites at which the employees would be assigned.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Since, in its response, the petitioner confirmed that its employees provide services off-premises, either in patients' homes or in nursing facilities, the director found the failure to provide evidence of having posted the Notice of filing ETA Form 9089 at such premises grounds for denying the petition since the petitioner did not comply the regulatory requirements identified above.

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[4] *See* http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#notefile12 (accessed October 29, 2012)

On appeal, counsel asserts that the beneficiary would be employed as a "roving employee" and that the DOL regulations do not address such an employment situation.

However, on appeal, counsel again has provided no documentary evidence substantiating the nature of the company, its method for operating and providing services, or its relationship with the workers which it utilizes, whether as contractual workers or as actual employees. In 2006 alone, the petitioner paid $2,316,414.00 for contracted services, but provided no evidence of contacts between itself and any of the contractual workers.

Since the petitioner notes that its employees would not be working from the location, but would be "roving" in various locations, it must comply with the second scenario and post the Notice in the various locations in which the employee/beneficiary might be working.

Further, the AAO has examined the petitioner's own website.[5] The website describes therapist positions. The petitioner states:

> Our team is made up of the top therapists in communities throughout the U.S. If you are looking for full-time, part-time, contingent, traveling, or temporary to permanent *placement at a facility hear your home*, contact us…

[emphasis added].

The petitioner goes on to describe the settings in which it places its workers:

> provides *short-term, long-term, and temporary to permanent placements* of qualified, licensed therapists (including physical therapists, occupational therapists and speech-language pathologists) in *hospitals, nursing homes, and outpatient clinics throughout the U.S.*

[emphasis added].

According to the petitioner's own statements, as well as from statements from its clients, it is a recruiter and staffing agency. Is it not likely that a company would refer to itself as a recruiter and staffing agency if it provided services directly to patients. Rather, the petitioner indicates that it recruits therapists for client companies in a variety of settings. To do so, the petitioner would provide such services through contractual agreements. If the petitioner were recruiting therapists for clients, it would have clients in mind and would therefore, have to post a Notice of having filed ETA Form 9089 at those client facilities in order to comply with the DOL's regulations. If the work-site is unknown and the staffing agency has no clients, the application would be denied based on the fact

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[5] *See* (accessed December 5, 2012).

that this circumstance indicates no bona-fide job opportunity exists. In the instant circumstance, the petitioner provided no evidence of having posted Notices at any client facilities.

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

The director properly denied the petition because the petitioner failed to provide Notice in accordance with 20 C.F.R. § 656.10(d)(1).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does 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); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Beyond the decision of the director,[6] the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2).

According to USCIS records, the petitioner has filed 33 I-140 petitions and 41 I-129 petitions on behalf of other beneficiaries.[7] Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages, and prevailing wages in the case of the I-129 beneficiaries, to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the priority date, proffered wage, or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

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[6] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does 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); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

[7] According to USCIS records, [redacted] filed 41 I-129 petitions and 20 I-140s petitions, which are relevant to the period of time affecting the instant petition. [redacted] filed 20 I-129 petitions and 13 I-140 petitions, which are relevant to the period of time affecting the instant petition.

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.

ORDER: The appeal is dismissed.