



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

In Re: 12483784

Date: MAR. 5, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a staffing agency, seeks to employ the Beneficiary as a registered nurse. It requests her classification as a skilled worker under the third-preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This category allows a U.S. business to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that (a) the Petitioner provided proper notice of the filing of a labor certification; and (b) the job opportunity is *bona fide*.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. §1361. Upon *de novo* review, we will dismiss the appeal.

#### I. EMPLOYMENT-BASED PETITIONS FOR SCHEDULE A OCCUPATIONS

A Schedule A occupation is an occupation codified at 20 C.F.R. § 656.5(a) for which the U.S. Department of Labor (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 foreign nationals 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 a petitioner to test the labor market and obtain a certified labor certification 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 labor certification. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.<sup>1</sup> If USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

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<sup>1</sup> The priority date of the petition is January 2, 2020, the date the completed, signed petition was properly filed with USCIS. *See* 8 C.F.R. § 204.5(d).

## II. NOTICE OF FILING

The Director concluded, in part, that the record did not establish that the Petitioner provided proper notice of the filing of a labor certification (Notice). Petitions for Schedule A occupations must contain evidence establishing that the petitioner provided its U.S. workers with Notice prescribed by 20 C.F.R. § 656.10(d). A petitioner must provide Notice 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).<sup>2</sup> 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 petitioner'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.*

The DOL has stated:

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.

U.S. DOL, OFLC Frequently Asked Questions and Answers, Notice of Filing, Question 12, <https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!176> (last visited Feb. 1, 2021); *see also* 6 USCIS Policy Manual E.7(D)(4), <https://www.uscis.gov/policymanual>.<sup>3</sup>

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<sup>2</sup> In this case, there is no evidence in the record of a bargaining representative for the occupation.

<sup>3</sup> As set forth in the USCIS Policy Manual regarding posting locations of Schedule A Notices:

If the employer currently employs relevant workers at multiple locations and does not know where the beneficiary will be placed, then the employer must post the notice at the worksite(s) of all of its locations or clients where relevant workers currently are placed... The situation of multiple work locations may arise in, but is not limited to, a scenario when the employer is a staffing agency which has clients under contract at the time that the employer seeks to post a timely notice of filing. In support of the petition,

Here, the petition and the labor certification state that the primary worksite location is [redacted] located at [redacted], [redacted] NM 87111. The DOL ETA Form 9141, Application for Prevailing Wage Determination (PWD), also lists the worksite address as [redacted] and it indicates that the work will not be performed in multiple worksites or at another location. The prevailing wage was derived from the [redacted] New Mexico worksite location.<sup>4</sup> The Petitioner posted the Notice at [redacted] and at its headquarters in California, and it provided a copy of the Notice with the petition.

With the petition, the Petitioner submitted a copy of staffing vendor services agreement dated June 6, 2017, between it and [redacted] a division of [redacted] pursuant to which the Petitioner agreed to provide staffing services to healthcare centers operated by affiliates of [redacted]'s client, [redacted]. The agreement refers to the "Managed Services Provider Agreement" (MSP) between [redacted] and [redacted] which is not located in the record. Without the MSP, we cannot determine the terms under which [redacted]'s vendors may staff [redacted] facilities. Additionally, the Petitioner's agreement with [redacted] does not detail the [redacted] locations where qualified clinical personnel may be placed, nor does it indicate that registered nursing services are contemplated under the agreement. Further, the Petitioner's agreement with [redacted] does not guarantee that work orders will be issued for registered nursing services at any [redacted] locations, including [redacted]. Instead, the agreement states that [redacted] "is not obligated to place any orders or any particular volume of orders... under this Agreement."

In a notice of intent to deny (NOID) dated February 19, 2020, the Director stated that "it appears that the notice of filing an application for labor certification does not comply with the regulatory requirements." The Director noted that the Petitioner's agreement with [redacted] was specifically for physical therapist/assistant positions and not for registered nurses. In response to the NOID, the Petitioner submitted an employment agreement between it and the Beneficiary dated February 10, 2020, stating that the Beneficiary would primarily "provide professional nursing services to [redacted] [redacted] [redacted] NM [redacted] and to such health care facilities or organizations ("Client Facility") as Employer shall from time to time designate." The employment agreement further states that "Employee may be required to work in

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the employer may provide a copy of one posting notice supported by a list of all locations where the notice was posted and dates of posting in each location. The employer does not have to submit a copy of each notice.

*Id.*

<sup>4</sup> To meet Schedule A eligibility, a petitioner must submit a valid PWD obtained in accordance with 20 C.F.R. §§ 656.40 and 656.41. *See* 20 C.F.R. § 656.15(b)(1). As noted, "in situations where there are multiple worksites (for example, the employer is a staffing agency), if the employer knows where they will place the beneficiary, the prevailing wage is the wage applicable to the area of intended employment where the worksite is located. If an employer with multiple clients does not know where they will place the beneficiary among its multiple clients, the prevailing wage is derived from the area of its headquarters." 6 *USCIS Policy Manual, supra*, at E.7(D)(1). Based on the record before us, and as further detailed herein, the prevailing wage appears to be properly based at the Petitioner's headquarters in [redacted] California.

different Client Facilities within a thirty-five (35) mile radius from the Employee's assigned branch office."<sup>5</sup> The Petitioner asserted that the intended work location is [REDACTED]

In response to the NOID, the Petitioner also submitted a list detailing its nurse staffing work orders for various [REDACTED] healthcare centers throughout the United States in early 2020, including [REDACTED] and other facilities in New Mexico, New Hampshire, Vermont, Pennsylvania, Massachusetts, Delaware, Kentucky, West Virginia, New York, Washington, and California. It also provided specific work orders issued for [REDACTED].<sup>6</sup> The response also included a statement from the Petitioner's CEO which states that "in the unlikely event that the facility that [the Petitioner] intends to place the Beneficiary would not have a position available upon the Beneficiary being granted legal permanent resident status, she would be placed in an alternative location."

In his decision, the Director concluded that the Notice was not properly posted. Specifically, he determined that because the Beneficiary could work at multiple locations, and the Petitioner does not know where the Beneficiary would be placed, it should have posted Notice at the worksites of all of its clients where relevant workers currently are placed. On appeal, the Petitioner asserts that it knows where the Beneficiary will work and that it was only required to post the Notice at [REDACTED]. It asserts that there is no requirement as to the length of time that the Beneficiary has to be placed there; that it is permitted to plan for "future contingencies at other locations;" that it intends to employ the Beneficiary at [REDACTED]; and that its "business model, history, and past results" indicate that it will employ the Beneficiary at [REDACTED].

We agree with the Director and conclude that the Notice was not properly posted. The Petitioner has not established by a preponderance of the evidence that it has the ability to place the Beneficiary as a full-time registered nurse at [REDACTED]. While the Petitioner may intend to initially place the Beneficiary at [REDACTED], its agreement with [REDACTED] does not require that any work orders be issued for services at any facility; it does not indicate the names and locations of facilities where workers might be placed; and it does not indicate that professional nursing services are contemplated under the agreement. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). Thus, although work orders were issued to the Petitioner to provide nurse staffing services to [REDACTED] facilities in early 2020, the work orders do not establish a contractual agreement connecting the Petitioner to the provision of registered nursing services exclusively at the location detailed on the petition, labor certification, and PWD. On appeal, the Petitioner asserts that it cannot locate the addendum to the agreement naming [REDACTED] as a possible work location. However, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

<sup>5</sup> According to its website, [REDACTED] operates hundreds of healthcare centers across multiple states. [REDACTED] has nine other healthcare center locations within a 35-mile radius of [REDACTED] (last visited Feb. 2, 2021).

<sup>6</sup> The record does not contain invoices demonstrating that the Petitioner actually fulfilled the work orders submitted to the record.

Also, the record indicates that the Beneficiary might contractually be placed at other locations where the Petitioner employs other workers. Specifically, as previously highlighted, the Petitioner's employment agreement with the Beneficiary provides that her proposed work locations include [redacted] and "such health care facilities or organizations" as it may designate that are located "within a thirty-five (35) mile radius" from [redacted] in [redacted] New Mexico, is part of [redacted] which includes nine other medical centers within a 35-mile radius of [redacted] where the Beneficiary might be required to work. Therefore, even if the record sufficiently established a contractual relationship connecting the Petitioner to the provision of professional nursing services at [redacted] facilities, which it does not, the Beneficiary's employment agreement demonstrates that she might work at a number of them and not solely at [redacted]. Further, the record does not demonstrate whether the Petitioner has placement agreements with facilities other than [redacted] in the 35-mile radius where the Beneficiary might work. Thus, according to her employment agreement with the Petitioner, [redacted] is not the only worksite where the Beneficiary might work.<sup>7</sup> Because the record does not establish that the Petitioner knows where the Beneficiary will be placed, the Petitioner should have posted the Notice at the worksites of all of its locations or clients where relevant workers are currently placed. *See 6 USCIS Policy Manual, supra*, at E.7(D)(4). In addition, the prevailing wage should have been based at the Petitioner's headquarters in [redacted] California. *See 6 USCIS Policy Manual, supra*, at E.7(D)(1).<sup>8</sup>

In sum, the Petitioner asserts on appeal that it knows where the Schedule A employee will be placed - at [redacted]. However, because of the deficiencies detailed above, the record does not properly establish that the Petitioner knows where the Beneficiary will be placed.<sup>9</sup> Therefore, the Notice should have been posted at the worksites of all of its locations or clients where relevant workers are currently placed. Instead, the Petitioner posted Notice only at [redacted] in [redacted] New Mexico and at its headquarters in [redacted] CA. Thus, the Petitioner has not demonstrated that it posted Notice at all of the proper locations as required by 20 C.F.R. § 656.10(d)(1). The appeal will be dismissed for this reason.

### III. RESERVED ISSUE

As noted, the Director also determined that the record did not establish that the job opportunity is *bona fide*. However, because the Petitioner's defective Notice is dispositive in this case, we decline to reach and hereby reserve the appellate arguments regarding the remaining issue. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

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<sup>7</sup> Where there are multiple possible worksite locations, the Petitioner must describe the requirement on the labor certification, notice of filing, and PWD. The Petitioner did not do so here.

<sup>8</sup> In any future filings, the Petitioner must establish the validity of its PWD in accordance with 20 C.F.R. §§ 656.40 and 656.41, and that the Notice states the proper rate of pay as required by 20 C.F.R. § 656.10(d)(6).

<sup>9</sup> We note that in a letter submitted on appeal, the Petitioner asserted that it places registered nurses at "hundreds of facilities throughout the U.S.," but the record does not identify the Petitioner's relevant clients. In any future filings, the Petitioner must clarify its applicable clientele.

#### IV. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

Although not addressed by the Director in his decision, the record does not establish the Petitioner's continuing ability to pay the proffered wage. A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.* The proffered wage in this case is \$60,133 per year.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. Here, the record does not establish that the Petitioner paid the Beneficiary sufficient wages in any relevant year. If, as here, a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any.<sup>10</sup> If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.<sup>11</sup> The record does not contain the Petitioner's federal tax return, audited financial statement, or annual reports for 2020, the year of the priority date. Without this regulatory-prescribed evidence, we cannot affirmatively find that the Petitioner had the continuing ability to pay the proffered wage from the priority date.

We note that USCIS records show that the Petitioner has filed dozens of other Form I-140 petitions for other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.<sup>12</sup> For each year at issue, the determination of the Petitioner's ability to pay the wages of beneficiaries of Forms I-140 that were pending or approved as of, or filed after, the priority date of the current petition should be made as follows: (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and the Petitioner's other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c)

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<sup>10</sup> Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-946 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

<sup>11</sup> We may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967).

<sup>12</sup> We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage. Further, the Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

demonstrate that its net income or net current assets exceed the total wage deficiency.<sup>13</sup> The record does not establish the Petitioner's ability to pay all of the relevant beneficiaries in this case.

As detailed above, in any future filings, the Petitioner must submit additional evidence to establish its continuing ability to pay the proffered wage from the priority date onward.

**ORDER:** The appeal is dismissed.

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<sup>13</sup> It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).