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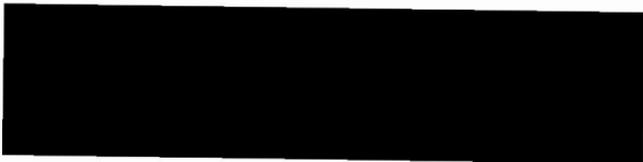


FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **MAR 27 2006**  
SRC 03 227 54005

IN RE: Petitioner: [Redacted]  
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:



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.

Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is a traveling nurse staffing agency<sup>1</sup> that provides board certified nurses for temporary assignments with health care providers. It seeks to employ the beneficiary permanently in the United States as a travel nurse. In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary as a registered nurse under section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). The petition states that the petitioner currently employs 103 employees in the United States and has a net annual income of \$430,000. Counsel asserts that the petitioner has filed, in addition to the instant petition, 132 additional petitions with Citizenship and Immigration Service (CIS) between October 1, 2003, and September 30, 2004, 58 of which have been approved.

The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.10, for which the Director of the United States Employment Service 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. Schedule A includes aliens who will be employed as professional nurses.

The director denied the petition, finding that the ETA 750 “does not indicate the beneficiary’s intended area of employment.” The director stated that *Matter of Sunoco Energy Development Co.*, 17 I&N Dec. 283 (Reg. Comm. 1979), held, “the labor certification is only valid for the area of intended employment. In this case, there is no area of intended employment.”

Moreover, the director found that the petition also did not list the intended place of employment for the proffered position, preventing her from certifying that the proffered wage meets the prevailing wage requirements for the beneficiary’s intended place of employment under the ETA 750, and whether therefore he qualifies for Schedule A classification under 20 C.F.R. § 656.22(e).

With the petition, counsel submitted:

- Counsel’s G-28;
- Duplicate Forms ETA 750;
- A July 21, 2003 certification by the petitioner’s controller that the company has 103 employees and that it has the ability to pay the proffered wage of the beneficiary;
- The petitioner’s letter dated July 21, 2003;<sup>2</sup>  
The petitioner’s standard employment agreement and assignment policy; and,
- The petitioner’s sample service agreement with client facilities.

The priority date is August 28, 2003.

The proffered wage is \$16.50 per hour.

On July 24, 2004, the director issued a Request For Evidence (RFE) seeking:

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<sup>1</sup> The petitioner states that a traveling nurse’s duties are identical to those of a registered nurse, except that the traveling nurse may work in different cities or states depending upon the length of the assignment.

<sup>2</sup> The letter states that the petitioner principally supplies medical staff to hospitals and nursing homes in rural parts of the Southern states names “where the shortage of registered nurses is most acute.”

- A list of the I-140 petitions the petitioner filed during 2003 and 2004;
- Evidence of the petitioner's ability to pay the proffered wage in the years 2003 and 2004;
- An estimate of the amount of income each beneficiary will generate;
- Copies of placement contracts; and,
- A letter from the petitioner's financial officer detailing its 2003 and 2004 wage and salary expense of the petitioner's business operating under a different name, if any.

In response, counsel submitted:

- The list of 132 candidates for whom the petitioner had filed Form I40s from October 1, 2002 to September 30, 2004;
- The petitioner's Form 1120S for 2003;
- A copy of the petitioner's CPA compiled, unaudited financial statements for 2002 and 2003;
- A client list of hospitals and nursing homes with contact information as of September 2004; The petitioner's sample service agreements for Crittenden County, Arkansas; Corpus Christi, Texas; Sumter, South Carolina; and Yazoo City and Greenwood, Mississippi;
- The petitioner's estimate of annual cost and profit margins per employee; and, The employment agreement between the petitioner and the beneficiary.

On appeal, counsel for the petitioner submits:

A copy of the May 16, 1994 Department of Labor Field Memorandum No. 48-94, "Policy Guidance On Alien Labor Certification Issues," by [REDACTED] Administrator for Regional Management;

- A copy of a Department of Labor prevailing wage determination, processed on November 19, 2004, for Crittenden County, Arkansas; DeSoto County, Mississippi; and Fayette, Shelby and Tipton counties, Tennessee; and, Section 1.5, "Location in the United States," *Labor Certification Handbook*, and [REDACTED]

On appeal, counsel further requested 30 days during which to submit a brief or additional evidence. On March 6, 2006, the AAO faxed counsel an inquiry asking counsel whether she had sent the brief and/or additional evidence, as promised, to which counsel made no reply. Accordingly, this office will review the documents currently in the file as the complete record of proceedings.

On appeal, counsel asserts that the director erred by ignoring the Department of Labor rule providing for ETA 750 applications for, as counsel states, "jobs that 'rove' or move around."

The rule for such jobs is that the application be filed in the state where jurisdiction lies for the 'main location of the company or its headquarters'. The prevailing wage is then determined for that location. See attached DOL Memorandum 48-94. Section 10.<sup>3</sup>

<sup>3</sup> "10. LABOR CERTIFICATION APPLIATIONS WHERE ALIENS WILL BE WORKING AT VARIOUS UNANTICIPATED SITES.

"Applications involving job opportunities which require the beneficiary to work in various locations throughout the U.S. that cannot be anticipated should be filed with the local Employment Service office having jurisdiction over the area in which the employer's main or headquarters office is located.

"In Item 7 [of ETA 750 A], the employer should indicate that the alien will be working at various unanticipated locations

Counsel also quotes from a treatise on the need for a national recruitment campaign in the case of jobs without a fixed job site.<sup>4</sup>

This office notes that the regulations at 20 C.F.R. § 656.20(c) require the prospective employer in Schedule A labor certification cases to make certain certifications in the application for labor certification. Specific to the issue of offering wages that meet the prevailing wage rate, the regulations require the prospective employer to make the following certification:

The wage offered equals or exceeds the prevailing wage determined pursuant to §656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work. See 20 C.F.R. § 656.20(c)(2).

The prevailing wage rate is defined further by the regulations at 20 C.F.R. § 656.40 as follows:

Determination of prevailing wage for labor certification purposes.

(a) Whether the wage or salary stated in a labor certification application involving a job offer equals the prevailing wage rate as required by 656.21(b)(3), shall be determined as follows:

(2) If the job opportunity is in an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes shall be:

(i) the average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages;

\* \* \*

b) For purposes of this section, except as provided in paragraphs (c) and (d), "similarly employed" shall mean "having substantially comparable jobs in the occupational category in the area of intended employment" . . . .

The Department of Labor (DOL) maintains a Website at [www.ows.doleta.gov](http://www.ows.doleta.gov), which provides access to an Online Wage Library (OWL). OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically. As noted, counsel has submitted a prevailing wage determination apparently drawn from the areas where the petitioner states it assigns traveling nurses.

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throughout the U.S. A short statement should also be included why it is not possible to predict where the work sites will be at the time the application is filed."

and *Labor Certification Handbook*, §1.5 *LOCATION IN THE UNITED STATES* Making no specific reference to Schedule A petitions, the authors state, "[T]he job need not have a specific location in the United States, such as jobs which can be performed at any location within the United States," [but if so, worker recruitment] "must be conducted nationally, and the employer must indicate the job opportunity can be performed at any location within the United States."

The petitioner indicates that it employs its nurses in the states of Mississippi, Arkansas, Texas, or South Carolina.<sup>5</sup> The petitioner provides a contract and the general region where the beneficiary would be employed. The director cited *Matter of Sunoco Energy Development Co.*, 17 I&N Dec. 283 (Reg. Comm. 1979) for the proposition that a labor certification is valid only for the area of intended employment.

The employment of aliens in Schedule A occupations must not adversely affect the wages and working conditions of United States workers similarly employed. See 20 C.F.R. § 656.10. The regulations governing Schedule A do not contain any language that certifies that the employment of any alien registered nurse anywhere in the United States, at any wage or salary, would not adversely affect the wages and working conditions of U.S. workers similarly employed. That determination is left to CIS's jurisdiction under 20 C.F.R. § 656.22(e) which sets forth that CIS has authority to review a Schedule A immigrant visa petitioner's satisfaction of labor certification requirements delineated under 20 C.F.R. § 656.20.

The regulation at 20 C.F.R. § 656.20(c)(2) states that a labor certification application must clearly show that the wage offered meets the prevailing wage rate and references 20 C.F.R. § 656.40. Thus, a petition that fails to prove that its proffered wage does not adversely affect the wages and working conditions of United States workers similarly employed results in a denied visa petition and an inadmissible beneficiary. In other words, a petition that offers a salary that fails to meet the prevailing wage rate as determined by the Department of Labor (DOL) will be denied.

Since the director found that the petitioner failed to specify the geographical location where the proffered employment will be performed, making it impossible for CIS to evaluate whether or not the proffered wage meets the prevailing wage rate as established by DOL. The director determined that the petitioner had failed to meet its evidentiary burden of showing that its proffered wage in this case will not adversely affect the wages and salaries of similarly employed U.S. workers.<sup>6</sup> Further, nothing in evidence demonstrates that the petitioner has conducted a national recruitment campaign for a job capable of being performed anywhere in the United States, as the counsel's cited treatise suggests.

Since Schedule A labor certifications are procedurally submitted directly to CIS and are not reviewed by the Department of Labor, CIS officers are authorized to determine the petitioner's compliance with the regulatory requirements governing Schedule A labor certification-based preference visa petitions. See 20 C.F.R. § 656.22(e). The city, state, and county of the employment location must be known in order to identify the prevailing wage rate.

Counsel's reliance upon the May 16, 1994 Department of Labor Field Memorandum No. 48-94 is misplaced. The memorandum appears intended for non-Schedule A certifications, with a field Employment Service office, near company headquarters, determining the prevailing wage determination. However, nothing in the record of proceedings indicates that the Department of Labor, rather than CIS, will be the certifying agency for the instant Schedule A determination. Moreover, even if Tennessee were one of the states the petitioner assigns its traveling nurses for services, it is unclear that U.S. workers, especially those outside Tennessee, would be likely to read a job notice posted in Germantown, Tennessee at company headquarters.

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<sup>5</sup> It is noted that the petitioner's statement omits mention of any Tennessee health facilities although the submitted prevailing wage determinations include those for Fayette, Shelby and Tipton counties in Tennessee.

<sup>6</sup> Counsel's printout of the Department of Labor's O\*Net Website, submitted on appeal, does not suffice as an official prevailing wage determination for registered nurses in Arkansas, Mississippi, and Tennessee. Further, the printout makes no mention of the prevailing wage levels in South Carolina or Texas.

Accordingly, the petition must be denied because the petitioner failed to comply with the regulatory requirements for a blanket labor certification for a Schedule A occupation.

The regulation at 20 C.F.R. § 656.22 states, in pertinent part:

(a) An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification . . . with the appropriate [CIS] office . . .

(b) The Application . . . shall include:

(1) Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form. . . .

(2) Evidence that notice of filing the application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.20(g)(3) of this part.

The regulation at 20 C.F.R. § 656.20(g)(1) states, in pertinent part:

In applications filed under ... 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:

(i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment.

(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 shall be posted for at least 10 consecutive days. [Emphasis added.]

The regulation at 20 C.F.R. § 656.20(g)(3) provides in pertinent part:

Any notice of the filing of an Application for Alien Employment Certification shall:

(i) State that applicants should report to the employer not to the local Employment Service Office;

(ii) 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;

(iii) State that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor.

The regulation at 20 C.F.R. § 656.20(g)(8) provides, in pertinent part:

If an application is filed under the Schedule A procedures at § 656.22 of this part, the notice shall contain a description of the job and rate of pay . . . .

The petitioner submitted a copy of a notice of job opportunity with its petition. The petitioner's president attested that the notice was posted for ten consecutive days. The petitioner indicated it posted the notice at company headquarters in Germantown, Tennessee. The evidence is insufficient to establish that the notice was posted at the actual facility or location of the employment where the beneficiary will be assigned as required by 20 C.F.R. § 656.20(g)(1).

As previously noted, the petitioner has submitted contracts that do not obligate the signatory hospitals to place the petitioner's nurses at their facilities. Because the petitioner has failed to identify the actual "facility or location of the employment," the petitioner cannot establish that it has complied with the notice requirements at 20 C.F.R. § 656.20(g)(1). If the petitioner merely posted the notice at its administrative offices, the petitioner has not complied with this requirement. The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers at the location of intended employment with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations.<sup>7</sup> The petitioner failed to establish that it fulfilled the posting requirement. The petitioner further failed to indicate whether it provided notice to the appropriate bargaining representatives. Given that the appeal will be dismissed for the petitioner's failure to establish the geographical area of the beneficiary's intended employment and the prevailing wage for that location, this issue need not be discussed further.

To establish the beneficiary's eligibility for classification as a registered nurse under section 203(b)(3)(A)(i) of the Act, the petitioner should have submitted a contract for a specific beneficiary to work at a specific hospital and evidence that the petitioner posted notice for ten days at that specific hospital or provided notice to the appropriate bargaining representatives.

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

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.

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<sup>7</sup> 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) .