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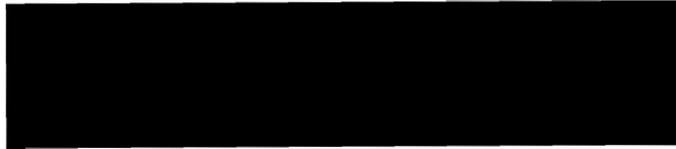
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JAN 24 2007  
WAC 03 166 54736

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:

SELF-REPRESENTED

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is a nursing registry. 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. § 656.10,<sup>1</sup> commonly referred to as Schedule A. The director determined that the petitioner had not established that the proffered position qualifies for treatment pursuant to Schedule A.

The director determined that the evidence submitted does not demonstrate that notice of filing the Application for Alien Certification was provided to the petitioner's employees or their bargaining representative as prescribed in 20 C.F.R. § 656.20(g)(1) and did not, therefore, demonstrate that the instant petition is qualified for treatment under Schedule A as the petitioner claimed.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated that the proffered position in this case is qualified for Schedule A treatment.<sup>3</sup>

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), 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 or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. This section also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as a skilled worker (registered nurse). Aliens who will be employed as registered nurses are listed on Schedule A. Schedule A is a list of occupations found at 20 C.F.R. § 656.10. The Director of the United States Employment Service has determined that an insufficient number of United States workers are able, willing, qualified, and available to fill the positions available in those occupations, and that the

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<sup>1</sup> This regulation was amended and encoded at 20 C.F.R. § 656.5 on March 28, 2005. Because the instant petition was filed before that date, however, it is governed by the earlier regulations. All the citations from Title 20 of the Code of Federal Regulations which follow refer to the regulations in place prior to March 28, 2005.

<sup>3</sup> If the petitioner were not claiming eligibility pursuant to Schedule A it could have, in the alternative, provided a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor. In the instant case, as the record does not include such an approved labor certification, the petitioner must show that the proffered position is amenable to treatment pursuant to Schedule A.

employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

The regulation at 20 C.F.R. § 656.22 states, in pertinent part, that an employer must apply for a labor certification for a Schedule A occupation by filing an application with the appropriate Immigration and Naturalization Service, now Citizenship and Immigration Services (CIS), office that will include:

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 20 C.F.R. § 656.20(g)(3)<sup>5</sup> 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. The notice shall be clearly visible and unobstructed while posted and shall 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, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 C.F.R. § 516.4 or occupational safety and health notices required by 20 C.F.R. § 1903.2(a).

The regulation at 656.20(g)(3) states,

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; and

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<sup>5</sup> The regulation should, apparently, have referred to 20 C.F.R. § 656.20(g)(1).

<sup>7</sup> The director also noted that if the petition is not amenable to Schedule A treatment it must be accompanied by a labor certification approved by the DOL, and that no such approved labor certification is present in the record.

(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.

In the instant case the record contains a notice of the proffered position and a certification pertinent to the posting of that notice. The record does not contain any other evidence relevant to the petitioner's posting of the job offered in the instant case. Other evidence in the record demonstrates that the petitioner provides nurses to 137 health care facilities in California and Nevada.

The notice describes the proffered position in accordance with the requirements in the regulations. The certification provided with that notice indicates that it was posted "at all of the offices of [REDACTED] Incorporated for a period of ten (10) consecutive days." That certification is dated April 24, 2003 but does not state during what ten-day period the notice of available positions was posted.

The director denied the petition on March 4, 2004. The decision noted that the record indicates that the notice of the proffered position was posted at the petitioner's offices rather than as required by 20 C.F.R. 656.20(g)(1). The director noted that the petitioner has not demonstrated, therefore, that the petition can be processed pursuant to Schedule A.<sup>7</sup>

On appeal, the petitioner argued that the offices of the petitioner are the location of intended employment within the meaning of 20 C.F.R. § 656.20(g)(1)(ii). Counsel argues that the notice of the proffered position in the instant case was therefore posted in accordance with that regulation.

The record does not contain a labor certification approved by the DOL. The evidence does not demonstrate that the petitioner's employees are represented by collective bargaining and that the notice of the proffered position was submitted to their bargaining representative. In order for the petition to be approved, therefore, the petitioner must demonstrate that the notice of the proffered position was posted "at the facility or location of the [proposed] employment" as required by 20 C.F.R. 656.20(g)(1)(ii).

When identifying the location at which the beneficiary would work the petitioner stated, on the Form I-140 petition, "see Exhibit 2" (Petitioner's Notice of Available Positions). The Notice of Available Positions states that the beneficiary would, "Report to client facilities as directed by the Petitioner." Further, the nature of the petitioner's business (a nurse staffing service) and the nature of the proffered position (registered nurse who provides direct care to patients) indicate that the beneficiary will not be employed at the petitioner's offices.

The plain meaning of the language in 20 C.F.R. 656.20(g)(1)(ii) "at the facility or location of the employment" indicates that the notice should have been posted, not at the employer's administrative offices, but where the beneficiary would actually be employed. Further, the purpose of posting the position is to provide U.S.

workers the opportunity to be informed of, and to apply for, the proffered position. This office finds that posting the notice at the petitioner's offices does not accord with either the letter or the spirit of the regulations. The notice was not, therefore, posted in accordance with the requirements of 20 C.F.R. 656.20(g)(1) and the petition may not be approved. The petition was correctly denied on this basis, which basis has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial.

The Form ETA 750 states that the wage proffered to the beneficiary is \$22.17 per hour. The petitioner is required, by 20 C.F.R. § 656.20(c)(2), to demonstrate that the proffered wage is at least as high as the prevailing wage. The regulation at 20 C.F.R. 656.40(a)(2) states that the prevailing wage is the average wage paid to workers similarly employed in the area of intended employment. In the absence of any statement in the record of the actual location at which the beneficiary would work,<sup>10</sup> this office is unable to determine whether the petitioner is offering the beneficiary the average wage for similarly employed workers in 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 show that the wage offered meets the prevailing wage rate. A petition that fails to prove that its proffered wage is at least equal to the prevailing wage rate shall be denied. The petition should have been denied for this additional reason.

Because the decision of denial did not discuss this issue, and the petitioner has not been accorded an opportunity to respond to it, today's decision is not based on this issue, even in part. If the petitioner attempts to overcome today's decision on motion it should address this issue.

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 appeal is dismissed.

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<sup>10</sup> A master list of the hospitals with which the petitioner contracts appears to indicate that the beneficiary might be employed in California or Nevada.