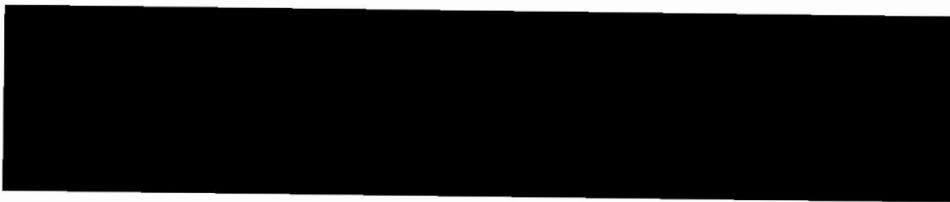




U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



B6

FILE:

[Redacted]  
WAC-05-062-53054

Office: CALIFORNIA SERVICE CENTER

Date: **MAY 17 2007**

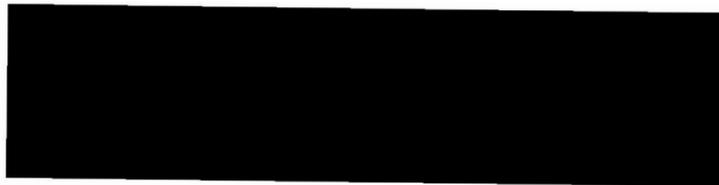
IN RE:

Petitioner:  
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:



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, 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 (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a skilled nursing facility. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA-750) with the Immigrant Petition for Alien Worker (I-140). The director determined that the petitioner had failed to comply with the Department of Labor (DOL)'s notification requirements and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific 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.

As set forth in the director's December 28, 2005 denial, the single issue in this case is whether or not the petitioner has posted the notice of filing in compliance with the requirements of the regulations. The director noted that the petitioner failed to post the notice in the physical location of employment.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), 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 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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program." The priority date of any petition filed for classification under section 203(b) of the Act "shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [Citizenship and Immigration Services (CIS)]." 8 C.F.R. § 204.5(d). Here, the priority date is December 21, 2004.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA-750 at Part A) in duplicate with the appropriate CIS office. The Application for Alien Employment Certification 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 20 C.F.R. § 656.20(g)(3).

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

In applications filed under § 656.21 (Basic Process), § 656.21a (Special Handling) and § 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 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. The relevant evidence in the record includes Posted Notice dated December 20, 2004 submitted with the initial filing and Notice – Offer of Employment dated July 27, 2005 submitted in response to the director's request for evidence (RFE) and Notice – Offer of Employment dated October 27, 2005 submitted on appeal. The record does not contain any other evidence relevant to the posting notice.

On appeal counsel asserts that the beneficiary has not yet been assigned to a facility and will be assigned to one of the petitioner's multiple facilities on an as needed basis, and therefore, posting the notice at its headquarters is the proper place for the posting, as that is the principal place of business for the petitioner.

The posted notice submitted with the initial filing begins with "A petition for permanent residence will be filed on behalf of an alien Registered Nurse currently or to be employed at this facility" and ends with the employer's verification that the notice was posted at the facility of intended employment from December 6, 2004 to December 20, 2004. However, the record of proceedings does not reflect that the petitioner has assigned the beneficiary a facility to be employed. The petitioner did not provide the physical address of the facility so that CIS could determine whether or not the petitioner posted the notice at the correct place. Both the July 27, 2005 notice and October 27, 2005 notice were submitted with a declaration of posting from [REDACTED] /P/CFO of the petitioner. Mr. [REDACTED] declared that the notices were posted at the offices of [REDACTED] Los Angeles, CA 90056. Although these two notices, the Form ETA 750 and the Form I-140 indicate that the beneficiary will work at [REDACTED] Los Angeles, CA, the record does not show that this location is a licensed skilled nursing facility for the petitioner, but the petitioner's administrative headquarters. Counsel concedes the same. CIS and DOL interpret the "facility or location of the employment" referenced at 20 C.F.R. § 656.20(g)(1)(ii) to mean the place of physical employment. The petitioner must post the notice of filing at the facility the

<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

beneficiary has been assigned or all possible facilities the beneficiary will provide professional registered nurse services to patients. Counsel's assertion that the posting notice was properly effected at the petitioner's headquarters is misplaced. The petitioner failed to submit evidence that the notice was posted in accordance with 20 C.F.R. § 656.10.

In addition, the AAO notes that in the July 27, 2005 and October 27, 2005 notices, Mr. [REDACTED] declared that the notices were posted for a period of 10 consecutive calendar days, from 7/13/05 to 7/27/05 and from 10/13/2005 to 10/26/2005 respectively. As indicated previously, the instant petition was filed on December 21, 2004. Therefore, the petitioner failed to establish with the two notices that the petitioner posted a notice of filing for 10 consecutive days prior to the filing of the petition. Since the petitioner failed to post the notice in compliance with regulations prior to the filing, any subsequent effort by the petitioner to correct the notice of posting would constitute a material change to the petition.

Section 122(b) of IMMACT 90 states, in pertinent part:

The Secretary of Labor shall provide, in the labor certification process under section 212(a)(5)(A) of the Immigration and Nationality Act, that -

(1) no certification may be made unless the applicant for certification has, ***at the time of filing the application, provided notice of the filing*** (A) to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought, or (B) if there is no such bargaining representative, to employees employed at the facility through posting in conspicuous locations... .

(Emphasis added.)

The statute clearly requires that notice of filing of a schedule A application be posted prior to the filing of the application - i.e., prior to the filing of the I-140 and the application for precertification under schedule A. If the petitioner was not already eligible when the petition was filed, subsequent development cannot retroactively establish as of the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm'r 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Therefore, the petitioner must be denied.

Therefore, counsel's assertion on appeal cannot overcome the director's decision and the evidence submitted does not establish that the petitioner has posted the notice of filing in compliance with the requirements of the regulations.

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.