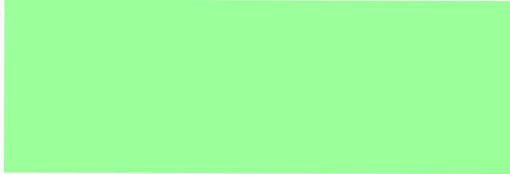




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **JAN 24 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: 

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:

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,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center (director), denied the immigrant visa petition. The petitioner filed a motion to reopen or reconsider, which was granted and the denial was affirmed. A second motion to reopen or reconsider was submitted, and the denial was again affirmed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a medical rehab, skilled nursing care business. It seeks to permanently employ the beneficiary in the United States as a registered nurse. 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).<sup>1</sup>

In his initial denial, the director noted that the posting notice submitted with the petition failed to provide sufficient time for comment on the notice of the filing of an ETA Form 9089, Application for Permanent Employment Certification, in accordance with 20 C.F.R. § 656.10(d)(3)(iii) and failed to provide the address of the appropriate Certifying Official on the posting notice in violation of 20 C.F.R. § 656.10(d)(3)(iv).

In its first motion to reopen, the petitioner provided a new posting notice, which the petitioner stated had been posted a month earlier than the first, which would have given United States workers the required minimum 30 days to file comments on the application. The new notice also included the address of the appropriate Certifying Official. The director reviewed this evidence and ultimately found it was not credible. The director noted that the petitioner did not provide an explanation why the petitioner would provide a clearly deficient piece of evidence when it possessed evidence in its possession that complied with the regulations. Additionally, the director noted that the signature on the posting notice, purporting to belong to [REDACTED] differed significantly from the many other exemplars of her signature in the record. The director reaffirmed the denial accordingly.

With the second motion to reopen or reconsider the petitioner provided a letter from [REDACTED] which explained that the petitioner posts multiple job opportunity notices to recruit registered nurses, and provided examples of [REDACTED] varying signatures. A letter from [REDACTED], Vice President, Director of Tax, Internal Audit and Risk Management for [REDACTED] was also submitted. [REDACTED] wrote to explain that the actual employer of the beneficiary would be [REDACTED] an indirect subsidiary of [REDACTED], which provides employees to its facilities and that [REDACTED] has the continuing ability to pay the proffered wage, with 60,000 employees and a budget of over two billion dollars. The motion was granted, and the denial was reaffirmed. The director found that the

---

<sup>1</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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, 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.

petitioner's arguments and newly provided evidence were not sufficient to overcome the basis of the denial.

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.<sup>2</sup>

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 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 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 (1)(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).

---

<sup>2</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 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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, the posting notice which was filed with the petition was posted from July 23, 2007, to August 8, 2007. The petition was filed on August 15, 2007, less than 30 days after the position was posted. The posting notice also did not contain the address for the appropriate Certifying Official. These errors were noted by the director.

The petitioner provided a second Notice to the director, which purports to have been posted from June 18, 2007, to June 30, 2007. This notice, which was provided after the director informed the petitioner of the first notice's failings, also does not comply with the regulations. The accompanying letter states the Notice was placed in a "clearly visible location on the employer's premises" but does not state where. Furthermore, the AAO agrees with the director, that the signature on this letter is inconsistent with other examples of [REDACTED] signature in the record including those in [REDACTED] letter dated May 21, 2009. In addition, although the petitioner has repeatedly stated that it posts multiple notices of job opportunity to recruit for registered nurses, the notice posted in June 2007 differs in format and text from the original notice posted in July through August 2007. Finally, the second notice, although purportedly posted in 2007, includes a signature date of March 11, 2009. No explanation is provided as to why the format and text vary from the other posting, or why the notice was signed nearly two years after it was posted. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in

support of the visa petition...It is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

On appeal, counsel asserts that the instant position was posted multiple times, and that the June 2007 Notice was not created after the director's initial denial. This assertion contradicts the date of March 11, 2009, shown on the June 2007 notice: 20 days after the director's decision. Further, counsel fails to explain why evidence of the June 2007 posting was not provided with the petition. Counsel has not overcome the doubt cast on the petition's evidence with objective and independent evidence. *See Matter of Ho, supra.*

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 establish it provided Notice in accordance with 20 C.F.R. § 656.10(d)(1).

Beyond the decision of the director,<sup>3</sup> the petitioner has also failed to establish that it will be the actual employer of the beneficiary. *See* 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3.

In determining whether the petitioner will be the beneficiary's actual employer, USCIS will assess the petitioner's control over the beneficiary in the offered position. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"); *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf.* New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

The evidence in the record does not establish that the petitioner will be the beneficiary's actual employer. The petitioner has provided contradictory evidence about who will pay and employ the

---

<sup>3</sup> 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 (9<sup>th</sup> 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).

beneficiary. We note that the ETA Form 9089 states that the employer is [REDACTED]. The petition, filed by the same entity, states that it employs 132 workers. However, in attempting to establish the petitioner's ability to pay the proffered wage, the petitioner submitted a letter from [REDACTED]. While asserting that [REDACTED] employs over 60,000 people and is an "indirect subsidiary" of [REDACTED], [REDACTED] notes that all beneficiaries of petitions filed by [REDACTED] are employed by [REDACTED] directly. No additional evidence was submitted to document a relationship between the petitioner and [REDACTED]. In fact, the letter appears to assert that the beneficiary will be an employee of [REDACTED] not the petitioner. At present, the petitioner has not established that it will be the actual employer and not the petitioner.<sup>4</sup> This issue must be resolved with any future filings.

Therefore, the petition must also be denied because the petitioner failed to establish that it will actually employ the beneficiary.

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.

---

<sup>4</sup> The letter from [REDACTED] states in the subject line that [REDACTED] is the petitioner, rather than the actual petitioner in the instant case, [REDACTED].