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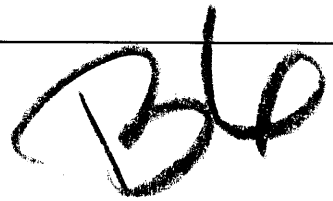
U.S. Department of Homeland Security

Citizenship and Immigration Services



ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

[redacted],

FILE: SRC-01-029-51926 OFFICE: TEXAS SERVICE CENTER DATE: JAN 09 2004

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

W Morse for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the director of the Texas Service Center and her decision was certified for review by the Administrative Appeals Office (AAO). The director's decision will be affirmed. The petition will be denied.

The petitioner is a medical contracting company. The petitioner currently employs approximately 100 or 125 employees[1] and has a net annual income of $164,000.00. It seeks to permanently employ the beneficiary 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, Schedule A, Group I. The director denied the petition after determining that a realistic job offer does not exist; the prevailing wage rate is not being offered; the proffered wage is adversely affecting the wages and working conditions of workers similarly employed in the United States; and the posting notice failed to provide notice of employment opportunity to a bargaining representative or its U.S. workers as required under 20 C.F.R. § 656.20(g).

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 filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse on July 27, 2000. Aliens who will be permanently employed as professional nurses are listed on Schedule A as 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. Also, according to 20 C.F.R. § 656.10, aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, or (2) hold a full and unrestricted license to practice professional

[1] The petitioner claims its employs 125 employees on its petition. In two other documents supporting the petition, the petitioner claims its employs "more than 100 employees" and "approximately 100 persons."

nursing in the [s]tate of intended employment.

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 Citizenship and Immigration Services (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).

In its initial petition filed on November 6, 2000, the petitioner described the proffered position as a registered nurse providing "professional basic nursing care and services to patients." The petition did not indicate an employment location other than the petitioner's address in Germantown, Tennessee. In its support letter, the petitioner described itself as a

> partner with hospitals and/or nursing homes, to assist them with their staffing shortages. Our client base is in rural America where the shortage of registered nurses is most acute. We presently have approximately 125 nurses working for us in the following states: Mississippi, Louisiana, Arkansas, Texas, Missouri, Georgia and South Carolina.

On Form ETA 750A Application for Alien Employment Certification, the petitioner describes the position as providing "comprehensive professional nursing care to patients" and left blank the item seeking information about the actual employment location.

Subsequent to the filing of the I-140 visa petition, the director requested evidence of the petitioner's ability to pay the proffered wages; evidence that the prevailing wage rate is being offered; evidence of a posting notice of the employment opportunity at the proposed work location; and evidence of the petitioner's relationship with health facilities where the beneficiary would be employed.

In response to the director's request for evidence, the petitioner submitted a copy of three contracts between (1) the petitioner and Greenwood Leflore Hospital ("Greenwood Contract"); (2) the petitioner and Tuomey Regional Medical Center ("Tuomey Contract"); and (3) the petitioner and Crittenden Memorial

Hospital ("Crittenden Contract"). The contracts were executed on June 28, 2001, May 1, 2001, and an unknown date, respectively. Each contract's provisions obligate the respective facilities to guarantee employment for the petitioner's foreign-trained medical professionals for at least one year at their facilities. Appendices to each contract set forth the names of Filipino nurses to be placed at each facility. None of the appendices includes the beneficiary's name.[2]

In its response to the director's request for evidence, the petitioner also stated in a letter that it had not established a work location for the beneficiary because of the difficulty in predicting its client's needs at the time the visa process is completed. The petitioner provided documentation of a revised compensation package indicating that the proffered salary was raised from $14.00 an hour, or $29,120.00 per annum, to $15.50 per hour, or $32,240.00 per annum. The petitioner also provided a posting notice with a job description that included the lower wages of $14.00 an hour. A letter from the petitioner's Financial Officer stated that since the petitioner employs more than 100 workers, it has the ability to pay the proffered wage. The petitioner also provided a copy of a CNN newspaper article discussing the nursing occupation in the United States. The petitioner's letter states the following:

> Given the current nursing shortage in the U.S. (recent CNN Healthcare Report included for your review) there are no Americans available to work in rural locations where we have clients. In the metropolitan areas where our clients are located the demand outstrips the supply again enforcing [sic] us to recruit foreign-trained nurses.

The director denied the third preference immigrant visa petition because the petitioner's response was received past the deadline established by regulation. However, the director exercised favorable discretion to consider the late evidence and moved to reopen the proceedings accordingly. The director issued another decision which denied the petition after determining that a realistic job offer does not exist; the prevailing wage rate is not being offered; the proffered wage is adversely affecting the wages and working conditions of workers similarly employed in the United States; and the posting notice failed to provide notice of employment opportunity to a bargaining representative or its U.S. workers as required under 20 C.F.R. § 656.20(g).

I. **<u>The petition is abandoned and must be denied</u>**.

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[2] The beneficiary, a Philippine national, was educated and trained as a nurse in the Philippines.

The director was correct in its initial decision to deny the petition as abandoned. The petitioner was provided 84 days (twelve weeks) to provide a response to the director's request for evidence. Three additional days were provided because the request for evidence was sent to the petitioner by mail. The request for evidence was issued on April 20, 2001. The response was due on July 16, 2001, including the additional three days. The petitioner's response was dated July 19, 2001 and was received by the service center on July 23, 2001, one week after the deadline established by regulations.

The regulation at 8 C.F.R. § 103.2(b)(8) states the following:

> Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or [CIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence. . . . In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence. Additional time may not be granted.

Additionally, the regulation at 8 C.F.R. § 103.2(b)(13) states the following: "(13) *Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied."

The regulations are clear that failure to respond to a request for evidence *shall* be considered abandoned and denied (emphasis added). Thus, the director should not have exercised favorable discretion in accepting late evidence and should have denied the petition as abandoned for failure to provide a timely response to the director's request for evidence.

II. **The petitioner failed to prove it is the beneficiary's actual employer and that permanent employment was prearranged at the time of filing the immigrant visa petition**.

The director denied the petitioner's visa petition, in part, because the petitioner's proffered employment to the beneficiary is speculative. The director determined the offer of employment to be unrealistic and void of an existent opportunity. The director referenced the failure of the petitioner's employment

contracts to identify employment opportunities for all of its apparent positions; and multiple pending immigrant visa petitions that confuse the numbers of possible current employees and prospective employment opportunities.

The first issues to be discussed in this case are (1) whether the petitioner is the beneficiary's actual employer, and (2) whether the petitioner has offered employment to the beneficiary that is permanent and not of a temporary or seasonal nature. In connection with these determinations, CIS examines the evidence of arrangements made for the beneficiary to work permanently in the United States as a registered nurse at the time of filing the immigrant visa petition.

A. **The petitioner has failed to establish that it is the actual employer and the proffered employment is permanent and not temporary or seasonal.**

For ascertaining whether or not the petitioner is the beneficiary's "actual employer," the regulations provide guidance at 20 C.F.R. § 656.3 as follows:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

The petitioner submitted contracts that generally set forth its relationship with third-party client health care facilities to provide foreign-trained medical professionals to them for a fixed term of one year. These contracts specifically name Filipino nurses in appendices to the contracts. Thus, the contracts guarantee one year of pre-arranged, full-time employment at a third-party client worksite for the specifically named Filipino nurses.[3] The contracts also establish an employer-employee

[3] Fixed-term contracts in certain circumstances have been upheld as pre-arranging permanent employment. *See Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968)(a secretarial shortage resulted in the petitioner providing a continuous supply of temporary secretaries to third-party clients which guaranteed permanent, full-time employment with its firm for 52 weeks a year with "fringe benefits"). *See also Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992)(permanent employment is established when a constant pool of employees are available for temporary assignments); *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), (for a temporary help service company, temporary positions would

relationship between the petitioner and the specifically named Filipino nurses as the contracts delineate the petitioner's responsibility to directly pay salaries and provide fringe benefits to the nurses.[4]

The record of proceeding, however, does not contain a contract or an appendix to a contract that delineates the scope of the beneficiary's employment. Thus, it is impossible to determine if the petitioner or the petitioner's third-party clients would be the beneficiary's actual employer or if the petitioner has the ability to offer pre-arranged, full-time, permanent employment for the beneficiary. The petitioner also failed to provide an employment agreement with the beneficiary or a third-party client that unequivocally states that the petitioner is the beneficiary's actual employer and all details concerning the scope of the proffered employment, such as a specific third-party worksite to which the beneficiary would be assigned.

To other Filipino nurses specifically named in the appendices to their contracts with third-party healthcare facilities, the petitioner provides employment benefits, has the authority to hire and fire, and at all times controls their work assignments, and has thus established it is those nurses' actual employer. The petitioner offers full-time, permanent employment positions to the Filipino nurses specifically named in the appendices as evidenced by their specific designation to third-party healthcare facilities. However, the petitioner failed to establish that the position offered to the instant beneficiary is a permanent full-time position and that the petitioner is the actual employer for failure to provide a contract that designates a third-party worksite to which the beneficiary would be assigned and the scope of the employment's terms.

B. **The petitioner has not established that it offered permanent employment *prior* to filing the visa petition.**

Even if one of the general contracts covered the beneficiary in one of the appendices to the contracts with the petitioner's third-party clients, the petitioner failed to arrange permanent

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include positions requiring skill for which the company has a non-recurring demand or infrequent demand).

[4] *Matter of Smith, supra*, at 773, has held that since the petitioner was providing benefits; directly paying the beneficiary's salary; making contributions to the employee's social security, workmen's compensation, and unemployment insurance programs; withholding federal and state income taxes; and providing paid vacation and group insurance, it was the actual employer of the beneficiary.

employment for the beneficiary *prior to filing the visa petition*. It is impossible for the beneficiary's employment to have been pre-arranged since no contract exists at all to delineate the scope of the proffered employment. The petitioner's contracts for other specifically named Filipino nurses that were submitted into the record of proceeding were executed *after* the filing of the visa petition (emphasis added).[5] Thus, even if those contracts applied to the beneficiary, they did not arrange permanent employment prior to filing the visa petition. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent date. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971). Thus, the petitioner has failed to establish that it offered pre-arranged, permanent, full-time employment prior to filing the visa petition.

III. **The petitioner has failed to establish that it is paying the prevailing wage rate and will not adversely affect the wages and working conditions of workers similarly situated in the United States**.

The director denied the petitioner's visa petition because she determined that the employment of the beneficiary would adversely affect the wages and working conditions of U.S. workers similarly employed because the petitioner is not offered a salary that meets the prevailing wage rate as defined by the regulations.

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.[6] 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

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[5] One contract is undated so it is impossible to determine if it was signed prior to the visa petition's filing date.

[6] 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).

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 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.[7] The prevailing wage rates are broken down into two skill levels. According to General Administration Letter (GAL) 2-98 (DOL), an OWL Level I position are:

beginning level employees who have a basic understanding of the occupation through education or

[7] The city, state, and county of the employment location must be known in order to identify the prevailing wage rate.

> experience. They perform routine or moderately complex tasks that require limited exercise of judgment and provide experience and familiarization with the employer's methods, practice, and programs.
>
> They may assist staff performing tasks requiring skills equivalent to a level II and may perform high-level work for training and development purposes.
>
> These employees work under close supervision and receive specific instruction on tasks and results expected.
>
> The level I job can require education and/or experience, but it does not require an advanced level of understanding to perform the job duties. Level I includes entry level jobs, but may also include some supervised activities, which exceed those normally, considered as entry level.

See also "DOL Issues Guidance on Determining OES Wage Levels," Training and Employment Guidance Letter No. 5-02 (DOL August 2002).

According to GAL 2-98 (DOL), a Level II position is the following:

> Level II employees are fully competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. They may supervise or provide direction to staff performing tasks requiring skills equivalent to a Level I. These employees receive only technical guidance and their work is reviewed for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations.

See id.

Training and Employment Guidance Letter (TEGL) No. 5-02 (DOL) further clarifies Level I and Level II designations in the alien employment certification program. TEGL No. 5-02 states the following:

> Any job may be performed at either level of skill, depending on the level of supervision provided, the relative complexity of the job duties, the level of judgment required, and application of the other factors

that distinguish between levels I and II.

. . . .

The generic occupation descriptions found in the OES/SOC [Occupational Employment Service Standard Occupational Classification], DOT [Dictionary of Occupational Titles], and similar coding structures does not provide sufficient information to the State Workforce Agency (SWA) to determine whether the job is level I or level II. . . . ***The job description is the primary determinant for a level designation***. Additional information regarding the job will not be given the same weight as the actual wording of the job description or the state job requirements (emphasis added).

. . . .

Under GAL 2-98, if a baccalaureate degree is normally required for entry into the occupation, the wage rate for a job offer that requires an advanced degree (Master's or Ph.D.) shall be at level II. There are instances when the employer can present sufficient evidence that the job does not require independent performance of all of the duties encompassed by the occupation and, therefore, is a level I in that particular instance.

A. **The proffered position is a skill Level I position for prevailing wage purposes. Skill level determinations are based on the position requirements and general occupational standards delineated by the Department of Labor.**

The director determined that the proffered position in this case is a skill Level II position for prevailing wage purposes. While the AAO agrees that the petitioner has not proven that it is offering a wage that meets the prevailing wage rate, the AAO does not concur with the director's reasoning.

CIS often looks to the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) to determine the appropriate minimum education and training requirements for entry into a particular position. In the 2002-2003 edition of the *Handbook* at page 269, the *Handbook* states the following about the training and educational requirements for registered nurse positions:

There are three major educational paths to registered nursing: associate degree in nursing

> (A.D.N.), bachelor of science degree in nursing (B.S.N.), and diploma. . . . Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses.
>
> . . . .
>
> [S]ome career paths are open only to nurses with bachelor's or advanced degrees. A bachelor's degree is often necessary for administrative positions, and it is a prerequisite for admission to graduate nursing programs in research, consulting, teaching, or a clinical specialization.

The proffered position resembles an entry-level nursing position as it does not specify an advanced level of training or experience or supervisory duties. The Form ETA 750A indicates that a supervisory nurse would supervise the beneficiary. The proffered position sets forth basic responsibilities of a nurse under supervision and thus delineated the position as a Level I position.

The director erred in analyzing the skill level of the proffered position through evaluating the beneficiary's qualifications. Additionally, the director erred in determining that because a nursing position typically requires an associate's degree to commence employment in an entry-level position as a registered nurse, the proffered position's requirement for a baccalaureate degree rendered the position a Level II position for prevailing wage purposes. The *Handbook* makes clear that nurses who had completed a baccalaureate degree may enter the nursing occupation through entry-level positions. Additionally, TEGL No. 5-02, published by the Department of Labor, who controls and publishes statistical information about prevailing wage rates for immigration purposes, clearly establishes that the position, and not the beneficiary, is the focal point for analysis. Thus, when determining prevailing wage rates and skill level designations, CIS should review the proffered position's requirements, description of duties, and determination of subordination or supervision, as GAL 2-98 and TEGL No. 5-02 guides, and utilize the *Handbook* as appropriate to determine educational and training standards for various occupations.

B. **The petitioner failed to identify a geographical location where the proffered position will be performed and thus fails to satisfy that its proffered wage meets the prevailing wage rate.**

In this case, the prevailing wage rate is impossible to determine since the petitioner failed to provide details concerning the

geographical location of the beneficiary's employment, since OWL's system requires designation of a geographical location where the employment will be performed. The petitioner indicates that it employs its nurses in the following states: Mississippi, Louisiana, Arkansas, Texas, Missouri, Georgia, or South Carolina. However, the petitioner fails to provide a contract or even identify the city, state, county, or general region where the beneficiary would be employed. The director was correct in citing *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 petitioner has a clear burden to establish that its immigrant visa petition meets all statutory and regulatory requirements. *See* Section 291 of the Act. Section 203(b)(3)(C) of the Act makes clear that an immigrant visa may not be issued until a determination is made by the Secretary of Labor that overcomes the inadmissibility bars found at section 212(a)(5)(A) of the Act. Section 212(a)(5)(A) of the Act states the following:

> Labor certification and qualifications for certain immigrants. -
>
> (A) Labor certification. -
>
> (i) In general. - Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that -
>
> . . . .
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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 regulations at 20 C.F.R. § 656.20(c)(2) state 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 (discussed above). 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 petitioner failed to specify the geographical location where the proffered employment will be performed, however, it is impossible for CIS to evaluate whether or not the proffered wage meets the prevailing wage rate as established by DOL. Thus, the petitioner failed to meet its evidentiary burden that its proffered wage in this case will not adversely affect the wages and salaries of similarly employed U.S. workers.

IV. **The petitioner failed to submit a posting notice that complies with regulatory requirements.**

The director also denied the visa petition because of the petitioner's failure to comply with notice of filing posting requirements for Schedule A labor certification applications. Specifically, the director notes that the posting notice was posted at the petitioner's place of business in Germantown, Tennessee.[8] The director stated the following:

> The petitioner has gone on the record that it supplies Registered Nurses to facilities in five states. No evidence was submitted that the petitioner had posted a Notice of Filing at any of the facilities in the five states where the beneficiary may provide services. The petitioner has only attempted to recruit U.S. workers in the Memphis [Tennessee, Arkansas, and Mississippi metropolitan statistical area], and at a wage that is more than 5% lower than the prevailing wage in that area. It should be noted that the regulation requires the Notice of Filing to the employer's employees must

[8] The director also stated that the wages offered were 5% lower than the prevailing wage rate. This is presumably based upon an assumption that the proffered position would be performed in Germantown, Tennessee. Since the AAO, as stated above in the previous section, does not have enough information concerning the geographical location of the proffered position, it is impossible to determine the prevailing wage rate.

> be posted at the *facility or location of employment*. Posting the Notice of Filing at the prospective employer's administrative office, where no employees similarly employed are working, and outside the area of intended employment, does not meet the requirements of the regulation.

The AAO concurs with the director's decision that the record does not contain evidence that the petitioner fully complied with regulatory requirements governing the posting notice. The regulations at 20 C.F.R. § 656.20(g)(1) state:

> 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 regulations at 20 C.F.R. § 656.20(g)(3)(iii) also require a petitioner to "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 petitioner's notice instructs any person with documentary evidence bearing on the application to provide his or her information to a local employment service office in Atlanta, Georgia. However, as duly noted, the petitioner has not indicated where the employment will be performed. The petitioner has indicated that the employment could

occur in Tennessee, Mississippi, Louisiana, Arkansas, Texas, Missouri, Georgia, or South Carolina. It is inapposite to direct applicants or individuals with relevant information about the application to a Georgia state employment services office for an employment offer that may not be carried out in the state of Georgia. Therefore, the petitioner fails to meet the requirements delineated under 20 C.F.R. § 656.20(g)(3).

Additionally, there is not enough information to determine if the notice complies with 20 C.F.R. § 656.20(g)(8) since, as discussed above in the prior section, the petitioner fails to produce evidence that it is offering a prevailing wage rate for a specific geographic location where the proffered position would be performed.[9] Additionally, since the petitioner has failed to identify the location where the work will be performed and the petitioner's intention is to contract the beneficiary to a third-party client's facility, the notice cannot conform to the regulatory requirements under 20 C.F.R. § 656.20. Under the regulations, the notice must be posted at the facility or location of the beneficiary's employment. Because the petitioner 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), (g)(3), or (g)(8). By merely posting the notice at its administrative office, 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 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.[10] The petitioner further failed to indicate whether it provided notice to the appropriate bargaining representative(s). Given that the appeal will be dismissed for the petitioner's failure to establish that it will be the beneficiary's actual employer, and has prearranged employment with proffered wages at the prevailing wage rate, this issue need not be discussed further.

To summarize, the AAO finds the evidence inadequate to establish

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[9] The regulations at 20 C.F.R. § 656.20(g)(8) state the following: "If an application is filed under the Schedule A procedures at Sec. 656.22 of this part, the notice shall contain a description of the job and rate of pay, and the requirements of paragraphs (g)(3) (ii) and (iii) of this section."

[10] *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).

eligibility for an immigrant visa under section 203(b)(3)(A)(i) of the Act and corresponding regulations and case law for failure to designate the hospital or facility where the beneficiary would work through an executed contract dated prior to filing the visa petition, failure to prove it is offering the prevailing wage rate for registered nurses in a specific geographic location where the proffered employment would be performed, and failure to comply with the posting notice requirements. However, the director improperly analyzed the prevailing wage rate issue with respect to skill level determination.

As always, 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.

Accordingly, the director properly denied the visa preference petition. The decision of the director to deny the petition will be affirmed.

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 director's decision is affirmed. The petition is denied.