Bruce A. Morrison
Attorney at Law
6004 Onondaga Road
Bethesda, MD 20816
Telephone: (301) 263-1142 Fax: (301) 263-1141
E-Mail: b.a.m@att.net

April 14, 2019

Submitted via ETA.OFLC.Forms@dol.gov

Thomas M. Dowd, Deputy Assistant Secretary
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue NW, Box PPII 12-200
Washington, DC 20210.

Re: Agency Information Collection Activities; Proposed Revision of a Currently Approved Collection; Request for Comments; Form ETA-9141, Application for Prevailing Wage Determination (OMB Control Number 1205-0508)

Dear Mr. Dowd:

I am a former Member of Congress (CT-3, 1983-91), chair of the House Immigration Subcommittee (1989-91), and member of the U.S. (Jordan) Commission on Immigration Reform (1992-97). I represent AMN Healthcare (the nation's largest healthcare staffing company) and its foreign nurse subsidiary, O'Grady Peyton International.

Recommendation

On behalf of my clients and other interested parties, I propose that the new ETA-9141 be amended in one of the following two ways:

A. On p. 4, in section (e), by amending Box 1 to read: "Worksite or headquarters address:" AND adding a new Box 7, renumbering the current Box 7 as Box 8 AND inserting the following in new Box 7; "Is the applicable prevailing wage for your case to be based on your headquarters location? Yes/No" AND by inserting at the beginning of the text in new Box 8 the following, "If you answered "no" in Box 7, respond to the following question."

OR

B. In proposed Appendix A, insert in the "Important Note" prior to the proposed text the following language: "Are you seeking a headquarters wage to comply with applicable rules? Yes/No. If the answer is "no", [continue with proposed language].

This will provide an appropriate way for applicants seeking a headquarters wage in accordance with applicable rules for their visa category to obtain that wage in a direct and transparent manner which avoids confusion later in the visa approval process.

Explanation

When PERM was implemented in 2005-06, I worked with Robert Divine (then USCIS GC and Acting Director) to establish an appropriate process for prevailing wage and posting requirements for Schedule A I-140 employment-based immigrant visa petitions filed by staffing companies. He coordinated the resulting rules with DOLETA. The resulting procedure is laid out in PERM FAQ Set 7 (2006) (Exhibit A) and in the USCIS Adjudicators Field Manual (AFM) at c. 22.2(b)(4)(C)(iv)(B) (Exhibit B).

This process involved applying the Prevailing Wage (PW) for the headquarters of the staffing company. Getting a prevailing wage determination (PWD) for the company headquarters using Form ETA-9141 requires answering "no" to the question on p.3, box E.c.7 (asking if there are other work locations) and inserting an explanation in Box E.c.7a. This process worked smoothly for more than a decade. But over the last two years, USCIS has begun denying petitions using this approach stating that this is a misrepresentation of the actual work location, although it is the only way to get solely a headquarters PWD using ETA-9141. Exhibit C attached is a submission to USCIS and a subsequent petition denial that illustrates the situation.

These denials continue despite the presentation to USCIS of the DoL instructions on how to get a headquarters PWD found in the attached explanation from an AILA liaison meeting on October 25, 2010 (Q. 13) (Exhibit D). They are using other, inapplicable FAQ answers in support of these denials.

The alternative proposed changes to the new ETA-9141 provide two possible ways for those seeking a headquarters wage pursuant to DoL and USCIS requirements for their visa category to make clear that they are seeking such a PWD without having to say that there are no other prospective worksites as they must do on the current form. USCIS has treated this as a misrepresentation when it is an artifact of the lack of an appropriate set of questions on the current form.

I am available to respond to questions about this proposal. Thank you for your consideration.

Sincerely,

Bruce A. Morrison
Attorney at Law

EXHIBIT A

POSTING TIMEFRAME

May I post a Notice of Filing for a permanent labor certification indefinitely?

Yes, an employer may post a Notice of Filing indefinitely, provided that at the time of filing the permanent labor certification application, the Notice of Filing was posted for at least 10 consecutive business days and those 10 consecutive business days all fell within 30 to 180 days prior to filing the application. In addition, the Notice of Filing must contain the correct prevailing wage information, the correct job description and must comply with all other Department of Labor regulatory requirements.

POSTING QUANTITY

I have multiple positions available for the same occupation and job classifications and at the same rate of pay. May I post a Notice of Filing for the same occupation and job classifications with a single posting?

Yes, an employer can satisfy Notice of Filing requirements with respect to several positions in each of these job classifications with a single Notice of Filing posting, as long as the single posting complies with the Department of Labor's regulation for each application (e.g. contains the appropriate prevailing wage information and the Notice of Filing must be posted for 10 consecutive business days during the 30 to 180 day time window prior to filing the application). For instance, separate notices would have to be posted for an attending nurse and a supervisory nurse (e.g. nurses containing different job duties).

NOTE: At the time of filing the labor certification, the prevailing wage information must not have changed, the job opportunity must remain the same and all other Department of Labor regulatory requirements must be followed.

POSTING LOCATION

Where must I post a Notice of Filing for a permanent labor certification for roving employees?

If the employer knows where the Schedule A employee will be placed, the employer must post the notice at that work-site(s) where the employee will perform the work and publish the notice internally using in-house media--whether electronic or print--in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage indicated in the notice will be the wage applicable to the area of intended employment where the worksite is located.

If the employer does not know where the Schedule A employee will be placed, the employer must post the notice at that work-site(s) of all of its current clients, and publish the notice of filing internally using electronic and print media according to the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage will be derived from the area of the staffing agencies' headquarters.

If the work-site(s) is unknown and the staffing agency has no clients, the application would be denied based on the fact that this circumstance indicates no bona-fide job opportunity exists. The employer cannot establish an actual job opportunity under this circumstance. A denial is consistent with established policy in other foreign labor certification programs where certification is not granted for jobs that do not exist at the time of application.

EXHIBIT B

USCIS ADJUDICATORS FIELD MANUAL (ARM)

AFM 22.2(b)(4)(C)(iv)(*B*) states that:

> *If the employer currently employs relevant workers at multiple locations and does not know where the Schedule A employee will be placed:* . . . The prevailing wage will be derived from the area of the **staffing agencies' headquarters**.

EXHIBIT C

June 25, 2018

OFFICER #XM1551
USCIS
Texas Service Center
P.O. Box 852381
Mesquite, TX 75185-2381

Re: ***Form I-140, SRC1890252298***
Petitioner: ***O'Grady-Peyton International (U.S.A.), Inc.***
Beneficiary: ***Chivonne Arlene Mitchell, Registered Nurse***

Dear Officer:

This letter is submitted by O'Grady-Peyton International (USA), Inc. (OGP), in response to your Request for Evidence (RFE) dated April 24, 2018, regarding the above petition. The response to your notice is as follows:

Education. Ms. Mitchell was educated in Trinidad and Tobago at the College of Science, Technology and Applied Arts of Trinidad and Tobago. She graduated as a Registered Nurse from their three year program in August 2007. Attached, as Exhibit H, is a Credential Report as prepared by Nadesha Mercer, Evaluator at CGFNS, which finds that the beneficiary's education is "comparable to completion of a first level general (Registered) nurse associate's degree program in the United States. Her transcripts were included in the original petition under Exhibit B.

This demonstrates she has the minimum required equivalent of a nursing diploma or certificate for two years of study or more before her priority date of February 7, 2018

Prevailing Wage. Attached under Exhibit B of the original petition we included Form ETA9141 Prevailing Wage Determination (PWD) for our company headquarters in Savannah Georgia. We are a "health care staffing company" and we employ health care personnel as our own employees and we place them at client health care facilities pursuant to placement contracts through which we maintain ultimate authority and control over the health care workers.

The use of the headquarters PWD is precisely the procedure prescribed for this petition by the Adjudicators Field Manual, which states at AFM 22.2(b)(4)(C)(iv)(*B*) that:

> *If the employer currently employs relevant workers at multiple locations and does not know where the Schedule A employee will be placed:* . . . The prevailing wage will be derived from the area of the **staffing agencies' headquarters**.

We followed the rules on obtaining the PWD as mandated by the AFM. The same rule articulated in the AFM is also stated by DoL in its PERM FAQ Set No. 7 (2006)

In order to obtain a headquarters prevailing wage to be used in the case of multiple placements of different employees who do not roam, but are assigned to various of the locations, the Department of Labor requires a special procedure to obtain the needed "headquarters wage" from the online prevailing wage system (iCERT). This is explained in the next section of this response.

The ETA-9141 Was Completed in Accordance with DoL Requirements. The NOID suggests that the Form ETA-9141 prevailing wage determination is not valid for this petition because Box E.c.7 is

answered "NO" when the beneficiary will be placed at one of the 63 contracted worksites for the petitioner, not at the headquarters location. As explained above, the prevailing wage that applies in this instance, under both USCIS and DoL rules is the headquarters prevailing wage. See AFM 22.2(b)(4)(C)(iv)(*B*); and PERM FAQ Set No. 7 (2006).

The procedure to obtain the headquarters prevailing wage in these circumstances is governed by DoL rules. Attached as Exhibit I is a copy of the official DoL-AILA Liaison Minutes from October 25, 2010, with the relevant section highlighted on the third page from the end (Q. 13, the pages are not numbered). They explain specifically that:

Section D.c [now E.c in the revised 9141] of the form asks whether there will be multiple worksites, and then provides a dropdown to enter city, etc. However, there is no mechanism to enter language such as "will work in locations as assigned by employer" when other worksites are unknown at the time of filing the PWR. Please advise how best to provide that information.

According to the DOL, do not answer "yes" to the question about multiple worksites if all worksites are not known. Put "no" and enter the language in another field (e.g., in D.a.6). Corporate headquarters address should be used for the 9141 in these instances."

The RFE suggests that because the ETA-9141 answers "no" in box E.c.7, this is inconsistent with the I-140 and ETA-9089 which detail multiple potential worksites for the beneficiary, with the actual worksite not to be determined until the beneficiary is ready to immigrate—several months or years in the future. The Question in Box E.c.7 is: "Will work be performed in multiple worksites within an area of intended employment or a location(s) other than the address listed above?" The instructions from DoL for this precise circumstances, as outlined in Exhibit I is to answer this box "no" in order to get the headquarters prevailing wage as required by both DoL and USCIS in this circumstance. See AFM 22.2(b)(4)(C)(iv)(*B*); and PERM FAQ Set No. 7 (2006).

USCIS is not authorized to override the instructions of DoL in how the prevailing wage determination request is to be completed. By complying with the DoL instructions, the petitioner has not created an inconsistency with the "multiple potential worksite" language in the I-140 and ETA-9089. The intention of determining among multiple worksites by a staffing company remains clear. This is just a case of having to use the method of one agency to obtain the determination to be used by another. USCIS cannot properly create a circumstance in which a petitioner cannot obtain the correct prevailing wage for its headquarters because the DoL form lacks the ability to provide the information in the same way as USCIS does on its form.

For these reasons, the ETA-9141 submitted provides the applicable prevailing wage for this petition.

We hope that this information will allow you to make a favorable determination in this case as soon as possible.

Sincerely,

Michele Kilkenny
Director of Immigration & Licensure

U.S. Department of Homeland Security
Attn: Premium Processing
P.O. Box 279030
Dallas, Texas 75227-9030

U.S. Citizenship and Immigration Services

TO:
O GRADY PEYTON INTERNATIONAL
c/o MICHELE KILKENNY
4 MALL COURT STE A
SAVANNAH, GA 31406

DATE: October 5, 2018

Petition: Form I-140

File Number: SRC1890252298
Beneficiary: CHIVONNE ARLENE MITCHELL

DECISION

Your Form I-140, Immigrant Petition for Alien Worker, has been denied for the following reason(s):

See Attachment

If you disagree with this decision, you may appeal to the Administrative Appeals Office (AAO) by filing a Notice of Appeal or Motion (Form I-290B) within 30 calendar days from the date of this letter, 33 calendar days if this letter is mailed. Alternatively, you may use Form I-290B to submit a motion to reopen or reconsider. For the latest information on filing location, fee, and other requirements, please review the Form I-290B instructions at http://www.uscis.gov/forms, call our National Customer Service Center at 1-800-375-5283, or visit your local USCIS office. If USCIS does not receive a properly filed appeal or motion, this decision will become final.

This decision does not prevent you from filing any petition or application in the future.

Sincerely,

Gregory A. Richardson, Director
Texas Service Center

Officer# XM1551

ATTACHMENT

The record indicates that you filed an Immigrant Petition for Alien Worker (Form I-140) for the beneficiary to perform services as a Skilled Worker under Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (INA) on March 13, 2018. Upon consideration, it is ordered that your petition be denied for the following reasons.

Prevailing Wage Determination Is Invalid for the Area of Intended Employment

The Prevailing Wage Determination (PWD) within the record does not establish that the PWD is valid for the job offered. It indicated that the beneficiary would only be working at one site, of which the address is 4 Mall Court Suite A Savannah, GA 31406; but the place of intended employment is contract Locations throughout the USA. The prevailing wage determination was therefore based on the Metropolitan Statistical Area (MSA) of Chatham (Savannah) County, Georgia, and/or any other unknown worksites that would be within that MSA. No locations outside of Chatham (Savannah) County, Georgia were listed on the PWD. However, the primary worksite information in the addendums provided at part H of the ETA Form 9089 and to Part 6 of Form I-140 does not include any locations within the Chatham (Savannah) County, Georgia MSA. Accordingly, the prevailing wage determination is not valid.

Aliens who will be permanently employed as Registered Nurses are identified on Schedule A as set forth at 20 C.F.R. 656.5 as being aliens who hold occupations for which it has determined there are not sufficient U.S. 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 U.S. workers who are similarly employed. Based on 8 C.F.R. §§ 204.5(a)(2) and (1)(3)(i) an applicant for a Schedule A position would file Form 1-140, "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. An employer shall apply for a labor certification for a Schedule A occupation by filing an ETA Form 9089, Application for Permanent Employment Certification, in duplicate with the appropriate USCIS office. Given that the instant matter was accompanied by an application for Schedule A designation, the priority date for this petition is the date the ETA Form 9089 was properly filed with the USCIS) on March 13, 2018. *See* 8 C.F.R. § 204.5(d).

Pursuant to 20 C.F.R. § 656.15, a Schedule A application shall include:

1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.

2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.1 O(d).

The regulation at 20 C.F.R. § 656.40(b)(4)(c) states in pertinent part:

> *Validity period.* The [State Workforce Agency (SWA)] must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a SWA [Prevailing Wage Determination (PWD)], employers must file their applications or begin the recruitment required by §§ 656.17(d) or 656.2 1 within the validity period specified by the SWA.

The petitioner must submit an individual labor certification issued by the Department of Labor or show that the occupation qualifies for Schedule A designation.

8 C.F.R. Section 204.5(k)(4)(i) states in pertinent part:

> ... Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program...

In applications for Schedule A designation pursuant to 20 C.F.R. Section 656.15(a), a petitioner must submit a prevailing wage determination from the State Workforce Agency (SWA) having jurisdiction over the proposed area of intended employment. According to 20 C.F.R. Section 656.40(c), the petition must be filed within the validity period which may be not less than 90 days or more than one year from the date the SWA issued the determination. The prevailing wage indicated in the notice will be the wage applicable to the area of intended employment where the worksite is located. Where the beneficiary's proposed worksite location is unknown, the prevailing wage will be derived from the area of the petitioner's headquarters.

In the DOL's Foreign Labor Certification website, under Frequently Asked Questions, the following is stated (this guidance was issued on February 06, 2013); USCIS notes that this question is now question E.c.7a of the current version of the form:

1). Rather than entering multiple worksite locations in Item D.c.7a on the ETA Form 9141, can I upload a list of worksite locations?

> No. For information to be considered for a PWD, an employer must begin entering the answer on the ETA Form 9141 in the appropriate field, including multiple worksite locations. *The iCert portal allows for up to 200 locations to be entered in Item D.c.7a.* (Emphasis added.) The employer must provide enough geographic detail about each area of intended employment to cover all known worksite locations. The NPWC does not require employers to list every worksite's physical address in order to receive a prevailing wage determination for the worksite. For multiple worksites, the employer must enter at least the appropriate counties (or independent city(ies)/township(s)/borough(s)/parish(es) as appropriate) and the corresponding state(s) where the employee will work.
>
> If the employer has more than 200 locations for one job description, the employer must submit a second ETA Form 9141[1]. The employer may use the "re-use" function in the iCert to pre-populate the form and replace the multiple worksite locations with additional worksites.
>
> Additional worksite locations that are uploaded by the employer as separate attachments will not appear on the ETA Form 9141 and will not be reviewed or provided wage determinations. If the employer does not list any of the worksite locations on the ETA Form 9141, the application will be deemed insufficient. If the insufficient application was mailed to NPWC, it will be returned to the employer. If the insufficient application was submitted electronically, it will be voided in iCert and the NPWC will send an email notification to the employer. If the employer lists some additional worksite locations on the ETA Form 9141 but uploads a separate attachment for the remaining worksite locations, the NPWC will only provide wages for the worksite locations actually listed on the ETA Form 9141.

2). I have job openings for the same position in multiple locations. Can I request one PWD for the same job being performed in many locations?

---

[2] *See* https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!471 and https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!472 (accessed on October 5, 2018)

> Yes. The employer may submit one PWD request for the same job to be performed in multiple locations, up to 200 locations. The employer must indicate it is requesting PWDs for multiple locations on the ETA Form 9141 in Item D.c.7 and list all of the locations in Item D.c.7a. For more information on entering multiple locations in Item D.c.7a, see FAQ # 5.

USCIS Request for Evidence, dated April 24, 2018, asked the petitioner to provide evidence of a prevailing wage determination which was valid on the priority date. The petitioner was afforded 30 (thirty) days to submit evidence in support of Form I-140. In the response, received on July 2, 2018, the petitioner asserted that the prevailing wage determination submitted with the petition previously was valid, attempting to argue incorrectly that USCIS is trying to force the petitioner to list locations on the ETA Form 9141 that it could not possibly know since the petitioner is always searching for new clients. The issue is the fact that the petitioner did not provide any locations for any other MSAs in the ETA Form 9141. While the addendum to question E.a.5. stated that the worksite was unknown, question E.c.7 was marked "no," and question E.c.7a was answered as "N/A" (not applicable) concerning other potential geographical locations. Since no other geographical locations are applicable, USCIS must conclude that the Chatham County, Georgia MSA is the only one to be considered for the PWD.

Even though BALCA decisions are not binding on USCIS, since the petitioner cited the Minutes of DOL Stakeholders Telephone Conference (March 25, 2010), as well as the corresponding USCIS guidance, USCIS never disputed the fact that the PWD was based on the headquarters. USCIS only disputes the information provided at E.c.7 and E.c.7a that the petitioner completed inaccurately. The petitioner appears to be attempting to make the argument that the petitioner should not have to list any worksites since some worksite locations are known, and some are not (because the petitioner is continually searching for and adding new or future clients who would be unknown on the date that the ETA Form 9141 is filed with the DOL); the record shows that the petitioner did not list any locations in the ETA Form 9141. Counsel also appears to argue that the fact that the headquarters address is used for the PWD when there are unanticipated locations in addition to the known locations somehow relieves the petitioner of the obligation to post the locations that are known at the time that the PWD is filed with the DOL. But the ETA Form 9141 only states that "(p)lease note that wages cannot be provided for unspecified/unanticipated locations," which is why in those situations the headquarters address is used to determine the wage for the PWD. Including the different worksites that are known would cause the DOL to issue a PWD for each location that is known and a PWD for all unknown locations using the headquarters address. Therefore, it is possible that some of the locations would have a higher PWD than what it would be for the headquarters address, which in turn would render the posting notices for those locations to be invalid. But counsel's citing of USCIS' guidance stating that the PWD of the headquarters address will be used when the employer has multiple locations and does not know where the employee will ultimately be placed still does not relieve the petitioner of the obligation per the ETA Form 9141's instructions to post the locations of the worksites of which it knows.

The petitioner asserts incorrectly that the Frequently Asked Question guidance cited above does not apply in the instant petition because he claims that the beneficiary will only be working in a single location which is not yet known. USCIS must refer the petitioner back to the verbiage listed in the original question (E.c.7), which states: "Will work be performed in multiple worksites within an area of intended employment ***or a location(s) other than the address listed above?*** (Emphasis added.) If either condition applies, then the petitioner must mark "Yes," and list all of the potential locations of which it is aware. Since the petitioner has multiple potential locations of which it is aware (as evidenced by the posting notices and signed staffing contracts submitted for each facility), then you are required to list all of the potential locations that are known prior to filing ETA Form 9141. There is no guidance in the current version of the DOL's ETA Form 9141's instructions or its Frequently Asked Questions that provides a scenario that does not require the petitioner to list the locations of which it is aware at the time that ETA Form 9141 is filed, regardless of the location where the employee will eventually ultimately be placed. In plain language, the petitioner is not required to list locations of which it does not yet know but is required to list all of the ones of which it was aware on the date that it files ETA Form 9141. Not following the instructions when the petitioner knows that the opposite is

true is essentially giving inaccurate information to the DOL. Doubt cast on any aspect of an applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho,* 19 I& N Dec. 582, 591-92 (BIA 1988).

Since instructions to the current version of the form do not state how one might answer question E.c.7 and E.c.7a differently in the manner described by the petitioner, and since the DOL's Frequently Asked Questions section of the Foreign Labor Certification website addresses this issue specifically, then we must determine that the only MSA that matters is the one in Chatham County, Georgia, because the petitioner indicated that the beneficiary would not be working anywhere outside of that MSA.

The inconsistency found between the Form I-140 and ETA Form 9141, posting notices, and the ETA Form 9089 calls into question the area of intended employment. The PWD was invalid due to the fact that the petitioner did not inform the DOL when it had the opportunity and the ability to add up to 200 possible worksites (or more, with one or more separate ETA Form(s) 9141), and it knew that some of these worksites were possible locations at the time that the ETA Form 9141 was filed. The petitioner knew of these potential worksites at the time that the PWD was filed because there would be no reason for the petitioner to apply for one or more beneficiaries if the petitioner did not already have clients who needed the staffing, and the petitioner had already signed contracts with some its clients to provide staffing. The plain language reading of the PWD requires the petitioner to include as many of the different potential jobsites that are known even if the actual location at which the beneficiary may eventually be placed is not yet known. Based on this inconsistency, USCIS cannot determine the area of intended employment and that the petitioner will employ the beneficiary under the terms of the labor certification.

Therefore, the beneficiary is not eligible for Schedule A designation.

Conclusion

8 C.F.R. Section 103.2(b)(16)(i) states that if the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service (now USCIS) and of which the applicant or petitioner is unaware, he/ she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/ her own behalf before the decision is rendered, except as provided in paragraphs 8 C.F.R. Section 103.2(b)(16)(ii), (iii), and (iv).

Since the petitioner may be unaware of the derogatory information, USCIS afforded the petitioner an opportunity to rebut that information and present information in its own behalf. USCIS also informed the petitioner that any explanation, rebuttal, or information presented by or in behalf of the petitioner shall be included in the record of proceeding.

Pursuant to Section 291 of the INA, whenever any person makes an application for an immigration benefit, they shall bear the burden of proof to establish eligibility. Accordingly, the petitioner must prove by a preponderance of the evidence, in other words, that it is more likely than not, that the beneficiary is fully qualified for the benefit sought. See *Matter of E-M-*, 20 I & N Dec. 77 (Comm. 1989). After a careful review and analysis of all evidence within the record, USCIS finds that the petitioner has not established eligibility for the benefit sought. As a result, USCIS is denying this Form I-140.

NOTE: The Small Business Regulatory Enforcement and Fairness Act established the Office of the National Ombudsman (ONO) at the Small Business Administration. The ONO assists small businesses with issues related to federal regulations. If you are a small business with a comment or complaint about regulatory enforcement, you may contact the ONO at www.sba.gov/ombudsman or phone 202-205-2417 or fax 202-481-5719.

EXHIBIT D

Minutes of DOL Stakeholders Telephone Conference
March 25, 2010

In attendance telephonically:

Department of Labor: William Carlson, Elissa McGovern, Stacey Shore, Bill Rabung

AILA: Catherine Haight, Jeanne Malitz, Sharryn Ross, Grace Hoppin, Doug Stump, Robin Thiel, Linda Rose, Wendy Hess, Allen Kaye

Other stakeholders groups in attendance:
NAFSA
ACIP
ABA

PERM Issues

PERM Denials: Recruitment

1. Members have reported denials without audit because no Sunday advertisement was placed; however, for certain jobs in rural areas where there is no newspaper in the area with Sunday publication, the regulations authorize placing the advertisements in the edition "with the widest circulation in the area of intended employment" in lieu of the Sunday advertisement. By denying these cases without audit, the employer loses the opportunity to demonstrate to DOL that the selected publication was appropriate. These cases then move into one of the two appeal queues, and may wait years for a resolution. While the failure to place a Sunday advertisement for a job in an urban or suburban area is clearly erroneous and grounds for denial, where the job is located in a rural area, can DOL issue an audit to request the justification of the selected publication, rather than simply denying? What reference does DOL use in determining whether a job is in a rural area? Should employers indicate on the PERM form that the job is in a rural area?

The Department of Labor reminds members that they can appeal denials on recruitment- related issues. However, it is acceptable to include a statement in H.14 or other area on the submitted ETA-9089 that the position is in a rural area that has no Sunday newspaper. Members may want to include newspaper circulation statistics or other information why the selected paper was appropriate under the regulations or put a statement such as "designated as a rural area in the census."

If you believe that there is more than one acceptable paper and received a denial, file a request for reconsideration and show that the newspaper is acceptable. DOL asked for examples of PERM denial letters stating that "this newspaper is the only acceptable version" since employers can argue that more than one newspaper is

12. How should "the equivalent of a Bachelor's degree" be noted as acceptable on a PWR? I.e., where should "Bachelor's degree or any combination of education, training and experience evaluated to be equivalent to US Bachelor's degree" be placed on the form. If you choose "Other" for degree, you are limited to the number of characters that you can type in the explanation box, which is not sufficient even with abbreviations. Because denials have been issued by DOL based on the fact that the PW form did not exactly match the 9089, we are concerned that the PW form does not allow input exactly what is stated on the 9089 form.

You may put such notes in another field, e.g., D.a.6 after the job duties.

13. **D.c.7 and 7a.** Section D.c of the form asks whether there will be multiple worksites, and then provides a dropdown to enter city, etc. However, there is no mechanism to enter language such as "will work in locations as assigned by employer" when other worksites are unknown at the time of filing the PWR. Please advise how best to provide that information.

According to the DOL, do not answer "yes" to the question about multiple worksites if all worksites are not known. Put "no" and enter the language in another field (e.g., in D.a.6). Corporate headquarters address should be used for the 9141 in these instances.

People who are putting "various locations" are causing system problems since it's not a valid entry. Worksites are used for various purposes depending on the program (i.e., H-2B, H-1B, PERM) so fill in the form accordingly. For H-1B, PWDs are given for short term placements to meet LCA requirements; for H-2Bs, DOL needs to know all locations so that they can issue the highest prevailing wage based on the itinerary; for PERM, DOL needs to know the work locations on the PWR so they know where recruitment will take place and whether employee is roving. DOL will issue the PWD accordingly.

Questions on PWD raised by other Stakeholders:

- Postdoctoral Fellows and Associates

DOL has addressed the issue of Level 2 and 3 wages given to PWRs for postdocs and agrees that Level 1 applies where the job duties appear to be industry standard and the minimum requirements is a Ph.D and there is no specified number of years of experience. If a PWD is still higher than a Level 1, use liaison (reports@aila.org) to have the information forwarded to DOL.

- Redeterminations

PWDs for Research Institutions and Institutions of Higher Education