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MAR 16 2005



FILE: WAC 03 036 54182 Office: CALIFORNIA SERVICE CENTER Date:

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: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a medical staffing service. It seeks to employ the beneficiary permanently in the United States as a registered nurse. As required by statute, a Form ETA 750, Application for Alien Employment Certification accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the completed, signed petition, including all initial evidence and the correct fee, was filed with CIS. *See* 8 CFR § 204.5(d). Here, the petition was filed with CIS on November 14, 2002. The proffered wage as stated on the Form ETA 750 is \$16.30 per hour, which equals \$33,904 per year.

On the petition, the petitioner stated that it was established on January 30, 1996 and that it employs 600 workers.¹ On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

¹ This office notes that in at least two petitions filed later that same month (WAC 03 044 50329 and WAC 03 044 51760) the petitioner stated that it employed 350 workers. In subsequent petitions filed during the ensuing year and five months the petitioner claimed to employ 350 workers, 540 workers, 531 workers, and 550 workers. This office is unable to reconcile the petitioner's claim of employing 600 workers on November 14, 2002 with those other claims. Because this issue was not raised by the Service Center, however, the petitioner has not been accorded an opportunity to respond.

In support of the petition, the petitioner submitted a letter, dated October 3, 2002, from its CEO. That letter states that the petitioner's gross receipts have grown to \$19.5 million annually.

The petitioner submitted its 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared a loss of \$354,938 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner submitted printouts of web content to show that the United States has a shortage of registered nurses. Finally, the petitioner provided a copy of a contract between itself and the beneficiary and a collated list of invoices of the hospitals with which it does business.

On March 31, 2003, the California Service Center requested additional evidence. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center acknowledged that the petitioner has stated that it employs 100 or more workers, but stated that the additional evidence of its ability to pay the proffered wage was, nevertheless, required.

The Service Center requested evidence that the beneficiary will fill a specific vacancy. To that end the Service Center requested copies of the contracts between the petitioner and the facilities at which its nurses work. The Service Center stated that the latter contracts should specify the number of nurses to be employed and the term of their employment.

The Service Center requested evidence that the proffered wage is equal to the prevailing wage for the proffered position in the area of intended employment.

Finally, the Service Center requested that the petitioner provide evidence to demonstrate that, in accordance with 20 C.F.R. § 656.20(g), the petitioner either submitted the notice of filing of the proffered position to its nurses' bargaining representative or, if its nurses are not represented by collective bargaining, that it posted the notice at the intended place of employment.

In response, the petitioner submitted a copy of its petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared ordinary income of \$584,355 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner also submitted an IRS printout showing figures from the petitioner's 2002 return. That printout confirms that during 2002 the petitioner declared \$584,366 in ordinary income.

This issue shall, therefore, form no portion of the basis for today's decision.

The petitioner also submitted a letter, dated June 17, 2003, emphasizing the increases in the petitioner's gross receipts, the number of nurses it currently employs², and its 2002 ordinary income in arguing that the petitioner has the ability to pay the proffered wage.

The petitioner noted that its 2002 ordinary income was \$584,366, which is sufficient to pay the wages of 12 nurses with salaries of \$46,113.60 per year. The petitioner stated that, therefore, it is entitled to have four more petitions approved. The petitioner submitted a calculation to support that assertion. That calculation includes the number of nurses with approved Form I-140 petitions in 2002, its number of active and inactive nurses inside the United States with work permits, its number of nurses outside the United States with approved Form I-140 petitions, the number of nurses who left the petitioner's employ during 2002, and the number of nurses the petitioner can show the ability to pay with its 2002 ordinary income.

As additional evidence of the petitioner's ability to pay the proffered wage, the petitioner submitted (1) a copy of the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the first quarter of 2003, (2) California EDD Magnetic Media Transmittal Sheets for the second, third, and fourth quarters of 2002 and the first quarter of 2003, (3) payroll summaries showing various statistics pertinent to the petitioner's payroll during 2002 and from January 1, 2003 to June 12, 2003, and (4) a loan agreement executed by the petitioner and Heritage Capital Group according the petitioner a \$3.5 million credit line, (5) a letter, dated June 12, 2003, from its CFO, citing the petitioner's credit line, increase in gross receipts, and net income during 2002 as evidence of its ability to pay the proffered wage, (6) staffing agreements between the petitioner and three hospitals, and (7) collated invoice information showing the amount it had recently billed its clients.

The Form 941 shows that the petitioner paid more than \$5 million in wages during the first quarter of 2003. The petitioner's transmittal sheets showed subject wages reported of \$3,797,842.31, \$3,935,966.13, \$4,422,393.43, and \$4,789,773.50 during the second, third, and fourth quarters of 2002 and the first quarter of 2003, respectively. The staffing agreements do not oblige the hospitals to employ the beneficiary, or any specific nurse or number of the petitioner's nurses.

As to the Service Center's request for evidence of a specific vacancy that the beneficiary would fill, the June 17, 2003 letter stated that the beneficiary is to be employed by the petitioner and is guaranteed full-time employment so long as she performs satisfactorily. The petitioner stated that the beneficiary would not learn the location of her work assignment until after completing training. The petitioner notes that the petitioner places nurses at 137 different hospitals. The petitioner provided a contract between the petitioner and the beneficiary. That contract does not appear to guarantee the beneficiary full-time employment.

As to the issue of the prevailing wage, the petitioner stated that it was raising the proffered wage to \$22.17 per hour, or \$886.80 per week. The petitioner observed that this amended proffered wage exceeds the proffered wage for entry-level registered nurses in Orange, California, where the petitioner maintains its office.

As to the issue of the notice of filing for the proffered position and its posting, the petitioner provided a copy of a new posting. That posting states that the proffered wage is \$22.17 per hour and that the petitioner had

² The petitioner states that it lost 19 registered nurses from its previous total of 466. The petitioner did not reconcile that statement with the various other numbers of workers it has claimed to employ.

217 vacancies as of April 7, 2003. A certification attached to that notice states that it was posted at the petitioner's offices for ten days. That certification is dated April 28, 2003.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on September 3, 2003, denied the petition. In that decision, the director relied upon figures from the petitioner's 2001 and 2002 income tax returns.

On appeal, the petitioner states, "I assume that the use of [figures from] the 2001 Federal Income Tax Return was inappropriate. I also assume that [use of figures from] the 2002 Federal Income Tax Return was appropriate because the priority date was so close to the tax year of 2002."

This office notes that the priority date is November 14, 2002, and is not during 2003, as the petitioner asserts. Use of the petitioner's 2002 tax returns was appropriate. In the instant case, this office shall not consider data from the 2001 return.

The petitioner also noted that it employs 100 or more employees and, in accordance with 8 C.F.R. § 204.5(g)(2), submitted the statement of a financial officer attesting to its ability to pay the proffered wage. The petitioner cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) that a reasonable expectation of increasing profits can demonstrate a petitioner's ability to pay the proffered wage. The petitioner argues that its expectation of a vast increase in profits is reasonable.

As additional evidence the petitioner submits monthly bank statements from June 2002 to September 2003 and information pertinent to the petitions recently submitted and those approved

The petitioner has shown considerable growth in recent years. Clearly, this growth is fueled by the indisputable shortage of nurses in the United States. No reason exists to assume that the petitioner will cease to grow. The petitioner's assertion, however, is that it will enjoy vast growth and remain profitable. In view of the fact that the petitioner is seeking approval of a large number of petitions, the petitioner must demonstrate the truth of that assertion in order to prevail.

The petitioner's citation of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is unconvincing. The petitioner in *Sonogawa* sought approval of a single petition. In that case the Regional Commissioner found that the unusual circumstances were sufficient to show that the petitioner would become profitable enough to pay the wage proffered in that single petition. The petitioner in the instant case asserts and, in order to prevail, must demonstrate, that its profitability will *vastly* improve so as to cover the salaries of the beneficiaries of the approximately 140 petitions filed during 2003. Nothing in the record, however, supports that assertion. Assuming that the petitioner's business will flourish so markedly that it will be able to continue to add numerous employees to its payroll and remain profitable is speculation.

The petitioner argues that its credit line permits the petitioner to continue paying wages notwithstanding delays and interruptions in its receipts. On that matter, the petitioner is correct. The petitioner notes that the banks willingness to extend it credit is based on its history of creditworthiness. That, too, is likely correct.

The petitioner further argues, however, that the credit line in itself demonstrates the ability to pay the proffered wage. This office does not agree with this final contention.

The petitioner can temporarily use the credit line in the event of an interruption in payments from its clients. That does not obviate the petitioner's obligation to demonstrate the ability to pay the proffered wage on a more permanent basis. A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. Although the credit line permits the petitioner to withstand delays and interruptions, the petitioner must show the ability, over a longer period, be it 60 days or a year or longer, to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not, therefore, part of the calculation of the funds available to pay the proffered wage during the course of, for instance, a calendar year.

Finally, the petitioner argues that the United States has an acute shortage of nurses and that humanitarian considerations require approval of the instant petition. That the United States has a shortage of nurses is confirmed by the DOL having placed registered nurses on the list of Schedule A occupations. This office views the assertion that the United States has a shortage of registered nurses as proven. That shortage does not, however, obviate the petitioner's obligation to demonstrate conformity with the statutes and regulations governing the instant visa category. Notwithstanding that the United States has a shortage of registered nurses, the petitioner must still demonstrate the continuing ability to pay the proffered wage beginning on the priority date.

With its appeal brief, the petitioner submits a copy of a letter, dated October 29, 2003, from its accountant. That accountant states that the petitioner's tax returns are not a valid index of its financial condition because, in order to reduce tax liability, they were prepared on a cash basis, rather than on an accrual basis. The accountant states that, had the payables and receivables been included on the petitioner's 2001 tax return, it would have reflected a profit of \$178,000. The accountant notes that the petitioner's receipts and profits both rose during 2002, and asserts that this was a direct result of employing more nurses.

The accountant's assertion that the net income shown on the petitioner's tax return is a poor index of its cash position is inapposite. That assertion neither demonstrates the ability to pay the proffered wage nor releases the petitioner from the obligation of proving that ability. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to rely exclusively upon tax returns to demonstrate its ability to pay the proffered wage.

Having elected to demonstrate its ability to pay the proffered wage with its tax returns, however, the petitioner is bound by those returns. If the tax returns fail to show the ability to pay the proffered wage, then the petitioner has failed to show its ability to pay the proffered wage unless it submits reliable evidence of additional funds available to the petitioner.

Further, that the petitioner's returns were prepared on a cash basis rather than an accrual basis does not, contrary to the accountant's assertion, make them poor indices of the funds available to the petitioner with which to pay wages. Although tax returns prepared pursuant to cash basis accounting may not facilitate comparing various

years to each other, they are at least as good an indicator of the funds that were available to the petitioner during a given year as are returns prepared pursuant to accrual.

The petitioner's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns.

The petitioner's reliance on the amount of its gross receipts and the amount of its wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses or otherwise increased its net income, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case the petitioner did not establish that it has ever employed the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the

AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$33,904 per year.³ The priority date is November 14, 2003. Evidence pertinent to the petitioner's finances prior to 2003 is not, therefore, directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

No copies of annual reports, federal tax returns, or audited financial statements were submitted pertinent to 2003. With the petition, however, the petitioner submitted the letters from its president/CEO and its CFO/controller stating that it has the ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states that such a letter may suffice to demonstrate the petitioner's ability to pay the proffered wage. Although 8 C.F.R. § 204.5(g)(2) also states that CIS may require additional evidence in appropriate cases, the director did not explicitly state his reason for finding that the instant case was an appropriate instance to disregard the statements of the president/CEO and the controller/CFO and require additional evidence.

The director observed, however, that the petitioner has filed multiple alien worker petitions. In fact, CIS computer records show that the petitioner filed 93 Form I-140 petitions during 2002, 140 such petitions during 2003, and another 57 petitions during 2004. The petitioner currently has more than fifty cases on appeal. This office finds that this unusually large number of petitions was sufficient reason to require additional evidence.

The petitioner declared ordinary income of \$584,366 during 2002. That amount is sufficient to pay the proffered wage to 17 beneficiaries with salaries similar to the proffered wage in the instant case. The petitioner, however, has recently filed petitions for 290 petitions. The petitioner's 2002 ordinary income, although substantial, is insufficient to show the ability to pay the proffered wages of such a large number of beneficiaries. The petitioner's 2002 ordinary income is insufficient to demonstrate the ability to pay the proffered wage. The petitioner has submitted no other reliable evidence pertinent to its ability to pay the proffered wage. The petitioner has not demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

An additional issue exists in this case, though, that was not addressed in the decision below.

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

³ This decision addresses below the petitioner's attempt to raise the proffered wage in response to the Request for Evidence.

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 record contains no indication that the petitioner's nurses are represented by collective bargaining. The Form ETA 750 states, at Item 7, Address Where Alien Will Work, "See Exhibit 2 (Petitioner's Notice of Available Positions)." Part 6 of the Form I-140 petition also refers to Exhibit 2 for the location where the beneficiary would work. Exhibit 2 is the original posting of the proffered position. That notice states that the beneficiary will "Report to client facilities as directed by Petitioner." The ETA 750, the petition, and the nature of the petitioner's business all make clear that the beneficiary would not work at the petitioner's offices, but at various hospitals. An employer's certification submitted with that posting indicates that it was posted at the petitioner's offices, not at the location where the beneficiary will work. The certification does not state the dates during which the notice was posted, but that it was executed on October 3, 2002. The notice itself is undated.

The location at which the petitioner would employ the beneficiary is unstated. The record contains no evidence, then, that the job notice was posted at the prospective place of employment as required by 20 C.F.R. § 656.20(g)(1). The petition should have been denied for this additional reason.

The petitioner's failure to name the facility at which the beneficiary will be employed raises yet another issue. The petitioner is required, by 8 C.F.R. § 204.5(g)(2), to demonstrate that the proffered wage is at least as high as the predominant wage. The regulation at 20 C.F.R. 656.40(a)(2)(i) states that the predominant wage is the average wage paid to workers similarly employed in the area of intended employment. In the absence of any statement in the record of the actual location at which the beneficiary would work, this office is unable to determine whether the petitioner is offering the beneficiary the average wage for similarly employed workers in the area of intended employment.

The employment of aliens in Schedule A occupations must not adversely affect the wages and working conditions of United States workers similarly employed. See 20 C.F.R. § 656.10. The regulations governing Schedule A do not contain any language that certifies that the employment of any alien registered nurse

anywhere in the United States, at any wage or salary, would not adversely affect the wages and working conditions of U.S. workers similarly employed. That determination is left to CIS's jurisdiction under 20 C.F.R. § 656.22(e) which sets forth that CIS has authority to review a Schedule A immigrant visa petitioner's satisfaction of labor certification requirements delineated under 20 C.F.R. § 656.20. The regulation at 20 C.F.R. § 656.20(c)(2) states that a labor certification application must clearly show that the wage offered meets the prevailing wage rate. A petition that fails to prove that its proffered wage is at least equal to the prevailing wage rate shall be denied. For this additional reason, the petition should have been denied.

The petitioner attempted, in response to the Request for Evidence, to raise the amount of the proffered wage. That attempt was made after the Form I-140 petition and the Form ETA 750 were filed in this case. The Form ETA was supported by a posting notice of the proffered position stating that the proffered wage is \$16.30. That evidence is necessary to demonstrate that the petitioner attempted to locate United States workers to fill the proffered position before resorting to filing the alien worker petition. The position was initially posted, however, with a wage offer well below the predominant wage for similar positions. That original posting does not render the petition approvable, as it does not support the proposition that the petitioner was unable to hire a United States worker for the proffered position at the predominant wage.

The petitioner submitted a revised posting notice of the proffered position. A certification appended to that notice states that it was posted at the petitioner's offices for ten day. The notice states that the petitioner had 217 vacancies as of April 7, 2003. The certification is dated April 22, 2003. The ten days during which the notice was posted were apparently between April 7, 2003 and April 22, 2003.

For a petition to be approvable, the petitioner must establish eligibility on the filing date. A petition will not be approved because the petitioner or beneficiary subsequently became eligible. To be eligible for approval, a beneficiary must have all the necessary training, education, and experience specified on the labor certification as of the date that the request for labor certification was accepted for processing by the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Education and experience gained subsequent to the filing date may not be considered in support of the petition, since to do so would result in according the beneficiary a priority date for visa issuance at a time when he is not qualified to perform the duties sought by the petitioner. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971).

The revised posting cannot possibly support the proposition that the petitioner had, in accordance with 20 C.F.R. § 656.20(g)(1)(ii), above, publicized the vacancy of the proffered position prior to the priority date, the date the petition was filed. Because the record contains no evidence that the petitioner complied with that regulation, the petition should have been denied for that additional reason. Further, even if the revised posting were accepted as valid, it would not cure the predominant wage problem in this case. That is, because the petitioner has not stipulated where it would employ the beneficiary, this office is unable to determine that the proffered wage is at least equal to the predominant wage in the area of intended employment.

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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petitioner also failed to demonstrate, in accordance with 8 C.F.R. § 204.5(g)(2), that wage proffered is at least equal to the average wage for similarly employed workers in the area of intended employment. The petitioner failed to demonstrate that it is able to pay the wage proffered to the beneficiaries for whom it has petitioned. The petitioner failed to demonstrate that a notice of the proffered position was posted in accordance with 20 C.F.R. § 656.20(g)(1). For all of these reasons the petition may not be approved.

ORDER: The appeal is dismissed.