U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

JAN 3 0 2007

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:
EAC-05-125-51130

IN RE: Petitioner:
Beneficiary: [redacted]

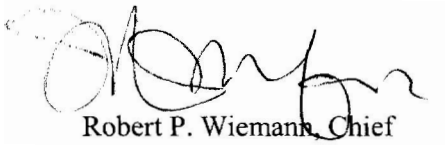
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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



Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Center Director (Director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an employment services company. It seeks to employ the beneficiary permanently 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. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 or labor certification) accompanied the petition. The director determined that the petitioner had failed to submit a valid Prevailing Wage Determination (PWD) that meets the requirements of 20 C.F.R. §§ 656.10 and 656.15. The director denied the petition accordingly.

The record shows that the appeal is properly filed timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 25, 2006 denial, the single issue in this case is whether or not the petitioner has filed the petition with a valid PWD under the requirements of the regulations.

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

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program." The priority date of any petition filed for classification under section 203(b) of the Act "shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [Citizenship and Immigration Services (CIS)]." 8 C.F.R. § 204.5(d). Here, the priority date is March 28, 2005.

The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the Department of Labor by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

The regulation at 20 C.F.R. § 656.15 states in pertinent part:

(a) *Filing application.* An employer must apply for a labor certification for a *Schedule A* occupation by filing an application in duplicate with the appropriate DHS office, and not with an ETA application processing center.

(b) *General documentation requirements.* A *Schedule A* application must include:

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

The regulation at 20 C.F.R. § 656.40(c) states:

> *Validity period.* The 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 PWD, employers must file their applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS,* 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[1]. The relevant evidence in the record includes two prevailing wage determinations (PWD) from New York State Department of Labor on appeal. The record does not contain any other relevant evidence pertinent to the PWD.

The director found that the petitioner failed to submit a PWD issued by the State Workforce Agency (SWA) having jurisdiction over the proposed area where the job opportunity exists despite the director's request on August 17, 2005. Therefore, the director denied the petition.

On appeal counsel asserts that this case is a "roving employee" case where the staffing agency is in fact an employer, and therefore, the PWD may be issued by SWA having jurisdiction over the petitioner's headquarters. Counsel submits two PWDs issued by New York State Department of Labor as the evidence of a PWD issued by SWA having jurisdiction over the proposed area where the job opportunity exists. However, one PWD was valid from August 18, 2005 to December 31, 2005 and the other was valid from January 10, 2006 to April 10, 2006, and thus, neither of the PWDs was valid at the time of the filing on March 28, 2005. The regulation at 20 C.F.R. § 656.40(c) expressly requests that employers must file the applications within the validity period of PWD specified by the SWA. The petitioner did not submit a PWD valid at the priority date.

Therefore, counsel's assertion on appeal cannot overcome the director's decision and evidence submitted does not demonstrate that the petitioner filed the instant petition within a valid period of a prevailing wage determination as required by the regulation.

Beyond the director's decision and counsel's assertions on appeal, the AAO will discuss another issue in this case whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. 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 regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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

> *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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is in this case the date the complete, signed petition (including all initial evidence and the correct fee) is properly filed with CIS. *See* 8 C.F.R.. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the priority date is March 28, 2005. The proffered wage as stated on the Form ETA 9089 is $52,000 per year. Evidence in the record relevant to the petitioner's ability to pay the proffered wage includes the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2002 and 2004, and bank statements for the petitioner's business checking account covering April and May of 2003.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The petitioner's 2004 corporate tax return is the most current return available at the time the petitioner filed the petition. Although 2005 would be most relevant, the AAO will analyze the most current available regulatory-prescribed piece of evidence in the record of proceedings. The petitioner's tax return for 2004 demonstrates that the petitioner paid salaries of $739,842 and had a net income[2] of $280,321 that year. Therefore, it appears that the petitioner had sufficient net income to pay the beneficiary the proffered wage. However, CIS records show that the petitioner filed more than one hundred I-140 petitions in 2005, the same year with the instant petition. The petitioner must show that it had sufficient income to pay all the wages at the priority date. Assuming all the beneficiaries were offered the same wage as the instant beneficiary, the petitioner needs to demonstrate that it had $5,408,000 to pay the proffered wages in 2005. However, as previously noted, the petitioner paid $739,842 and had net income of $280,321, totaling $1,020,163, which meets one fifth of the proffered wages the petitioner should have paid. Therefore, the petitioner failed to establish its ability to pay the proffered wages to all beneficiaries.

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[2] Ordinary business income (loss) from trade or business as reported on Line 21 of the Form 1120S.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.