

Identifying data deleted to
prevent clear, unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



File:

EAC-05-238-50232

Office: VERMONT SERVICE CENTER

Date: SEP 20 2007

In re:

Petitioner:

Beneficiary:



Petition:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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 Director, Vermont Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The appeal will be dismissed.

The petitioner operates a staffing, placement agency, and seeks to employ the beneficiary permanently in the United States as a registered nurse, a professional or skilled worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii). For the beneficiary to qualify, the petitioner must show that it has the ability to pay the beneficiary the proffered wage, and that the beneficiary meets the qualifications set forth in the certified labor certification.

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the Department of Labor (“DOL”) 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.

Based on 8 C.F.R. § 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file Form I-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 Program.”¹ 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).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer’s completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer’s employees as set forth in 20 C.F.R. § 656.10(d). Also, according to 20 C.F.R. § 656.15, 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 nursing in the [s]tate of intended employment, or that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

¹ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

Additionally, the petitioner must demonstrate its ability to pay the proffered wage. The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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 the case at hand, the petitioner submitted the Application for Alien Employment Certification, Form ETA-750² with the I-140 Immigrant Petition with the I-140 Immigrant Petition on August 31, 2005, which is the priority date. The proffered wage as stated on Form ETA 9089³ for the position of a nurse is \$26 per hour, 40 hours per week, which equates to an annual salary of \$54,080. On the I-140 petition filed, the petitioner listed the following information: established: 1996; gross annual income: \$79 million; net annual income: not listed; and current number of employees: 170.

On October 26, 2005, the director issued a Request for Evidence ("RFE") for the petitioner to submit: Form ETA 9089 in duplicate; a prevailing wage determination from the State Workforce Agency (SWA) which has jurisdiction over the proposed area of employment; evidence that the position was properly posted for 10 consecutive business days; to indicate where the beneficiary would be employed and where the position was posted; and to submit evidence that the beneficiary held an unrestricted license to practice nursing in the state of intended employment, or that she had passed the Commission on Graduates of Foreign Nursing Schools (CFGNS) Examination.⁴ The petitioner responded.

On March 15, 2006, the director denied the petition on the basis that the petitioner failed to properly post the position in accordance with 20 CFR § 656.10(d)(1). Specifically, the notice must be posted within 30 to 180 days of filing. The petitioner submitted two notices, one of which was dated August 12, 2005, and the second was dated October 10, 2005. Neither posting was completed within 30 to 180 days of filing. The position was, therefore, not properly posted for the required ten consecutive business days prior to filing. Accordingly, the petition did not qualify for Schedule A certification, and was denied. The petitioner appealed and the matter is now before the AAO.

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.⁵

² In accordance with the PERM regulations, pursuant to 20 C.F.R. § 656.17, the petitioner should have submitted Form ETA 9089, Application for Permanent Employment Certification. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). The petitioner later submitted this form in response to the director's Request for Evidence.

³ We note that the petitioner has listed the wrong beneficiary on Form ETA 9089, Section J, Alien Information. Further, we note that the petitioner listed the educational requirements on Form ETA 750 as a Bachelor's or Associate's degree in Nursing. On Form ETA 9089, the petitioner has failed to identify the level of education required and only lists the major field of study as Nursing.

⁴ The petitioner provided documentation that the beneficiary was licensed in New York state, and additionally that she passed the CFGNS exam.

⁵ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which

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

On appeal, counsel provides that the only issue raised was the deficient posting notice, and that the petitioner did properly post the notice.

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

One of the requirements to meet Schedule A eligibility is that the petitioner is required to post the position in accordance with 20 C.F.R. § 656.10(d), which provides:

- (1) In applications filed under § 656.15 (Schedule A), § 656.16 (Shepherders), § 656.17 (Basic Process); § 656.18 (College and University Teachers), and § 656.21 (Supervised Recruitment), the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the certifying officer as follows:

...

- (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 must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must 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 . . . In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization.

...

- (3) The notice of the filing of an Application for Permanent Employment Certification shall:

- (i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
 - (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
 - (iii) Provide the address of the appropriate Certifying Officer; and

are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

(iv) Be provided between 30 and 180 days before filing the application.

...

(6) If an application is filed under the Schedule A procedures at § 656.15. . . the notice must contain a description of the job and rate of pay and meet the requirements of this section.

Additionally, Section 212 (a)(5)(A)(i) of the Act states the following:

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 . . . that

- (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

Fundamental to these provisions is the need to ensure that there are no qualified U.S. workers available for the position prior to filing. The required posting notice seeks to allow any person with evidence related to the application to notify the appropriate DOL officer prior to petition filing. *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).

To be eligible for a Schedule A petition, as set forth above the petitioner would need to have posted the position pursuant to 20 CFR § 656.10(d)(3)(iv) 30 to 180 days prior to the August 31, 2005 filing, and have met the other requirements of 20 CFR § 656.10(d).

The posting notice initially submitted was deficient as it was dated August 10, 2005, and was not completed more than 30 days prior to filing. Further, the notice lists that it was posted for "10 consecutive days," rather than the "10 consecutive business days" required to meet the PERM regulations. Additionally, while the posting notice lists a rate of pay of \$26.00 per hour, the pay rate was typed over another amount, which appears to list \$23.40 per hour. It is unclear when the rate of pay was changed to \$26 per hour, or whether the amount was altered after the posting. We additionally note that the posting notice failed to list the appropriate address for the regional certifying officer in accordance with 20 C.F.R. § 656.10(d)(3)(iii). The second notice that the petitioner submitted was dated October 10, 2005, and was not completed more than 30 days prior to filing, but instead after the filing. Similarly, the notice lists that it was posted for "10 consecutive days," rather than the "10 consecutive business days" required to meet the PERM regulations. Further, the posting notice failed to list the appropriate address for the regional certifying officer in accordance with 20 C.F.R. § 656.10(d)(3)(iii).

On appeal, counsel provides an affidavit from the petitioner in support. In the affidavit, the recruitment coordinator for Staffing Remedies provides: that the notice was posted for 10 consecutive business days at least 30 days prior to filing; that based on the "high need" for nurses, Staffing Remedies always has a posting for nurses; that "even though the original posting [for the beneficiary] was dated August 12, 2005 the actual

notice was also posted from July 1 to 15 in her place of intended employment;" that the notices posted on August 12, 2005 and on October 10, 2005 did not specify the dates of posting since "notices of filing of an application for alien employment certification are posted all-year round in the facilities where the nurses are assigned." The affidavit further provides that the petitioner posts notices on its website, and regularly advertises in ethnic newspapers.

The affidavit is insufficient to overcome the deficiencies in the posting. Even if we were to accept that the petitioner did post the notice from July 1 to July 15, the petitioner did not provide evidence that the posting listed the appropriate address for the regional certifying officer in accordance with 20 C.F.R. § 656.10(d)(3)(iii), and the notice would still be considered deficient. Further, the website postings that the petitioner provided were deficient to meet the requirements of 20 C.F.R. §§ 656.10(d)(3)(i), 656.10(d)(3)(i)(ii) and 656.10(d)(3)(iii). Additionally, the website postings failed to provide job duties or salaries in accordance with 656.10(d)(6). As a result, the "ongoing" postings fail to meet the requirements of 656.10(d)(3).

Additionally, although not raised in the director's decision, the petitioner failed to obtain a prevailing wage determination ("PWD") in compliance with 20 CFR § 656.40 from the relevant State Workforce Agency ("SWA") prior to filing. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (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).

20 C.F.R. § 656.40 specifically sets forth that the petitioner must request a wage and the wage obtained is assigned a validity period. In order to use a prevailing wage determination ("PWD"), "employers must file their [Schedule A] applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA." *See* 20 C.F.R. § 656.40(c). The petitioner must file Form ETA 9089 and Form I-140 with the prevailing wage determination issued by the SWA having jurisdiction over the proposed area of employment. *See* 20 CFR § 656.15(b)(i). A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner here only submitted the PWD in response to the RFE. The PWD is dated January 9, 2006 with validity dates of January 17, 2006 to December 31, 2006. Accordingly, the wage was obtained subsequent to filing the petition and not valid at the time of posting, or at the time of filing.

The petitioner failed to meet the posting requirements as set forth in 20 C.F.R. § 656.10(d), and failed to file with a copy of a prevailing wage determination. Accordingly, the petitioner has failed to meet the regulatory requirements, which require that the posting notice be completed prior to filing the Schedule A application. 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.