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



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 16 2008
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IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

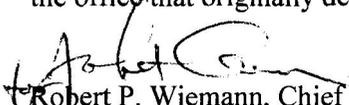
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hospital. 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. § 656.5, 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 file the preference visa petition within the validity period of the prevailing wage determination (PWD) and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and maintains that the petitioner's petition was consistent with the applicable requirements and that the petition should be approved.¹

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Immigrant Petition for Alien Worker (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 May 17, 2006.

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 DOL 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. Therefore these regulations apply to this case because the filing date is May 17, 2006.

¹ 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.

The sole issue on appeal in this matter is whether the petitioner filed the I-140 within the validity period of the state PWD issued by the State Workforce Agency (SWA) applicable to the certified position in compliance with the applicable regulations found at 20 C.F.R. Part 656.

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* 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 § 656.10(d).

The regulations at 20 C.F.R. § 656.40 state in relevant part:

(a) *Application process.* The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer....

(b) *Determinations.* The SWA determines the prevailing wage as follows:

(1) Except as provided in paragraphs (e) and (f) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms-length between the union and the employer, the wage rate set forth in the CBA agreement is considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it is considered the "prevailing wage" for labor certification purposes. . . .

(c) *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 application or begin the recruitment required by §§656.17(d) or 656.21 within the validity period specified by the SWA.

With the initial filing of the I-140, the petitioner submitted a PWD from the New York State Department of Labor that was valid from the determination date of January 6, 2006 until the expiration date of April 6, 2006. The prevailing wage is stated as \$28.45 per hour, which is also reflected on the petitioner's ETA Form 9089, Part F and on Part G as the offered wage per hour for the certified position.

In response to the director's request for evidence issued on November 16, 2006 advising it that the SWA PWD was not valid at the time of the submission of the petition on May 17, 2006, the petitioner provided a letter from [REDACTED], RN, who is the petitioner's professional recruiter. Providing a copy of a DOL website relevant to a time period from July 2006 to June 2007, she advises that the original PWD of \$28.45 per hour was effective during the 2005 calendar year and that the actual prevailing wage between January 2006 and June 2006 was \$29.71 per hour. Ms. [REDACTED] asserts that the difference in amounts was not significant in the lack of response to the posting and that it was harmless error that the petition was not submitted during the validity period of the PWD actually provided.

The director denied the petition on March 28, 2007, concluding that since the filing date of the I-140 did not fall with the date range of the validity period of the SWA PWD, the petition may not be approved.

On appeal, counsel states that the I-140 petition and all attachments including the PWD was timely submitted on March 8, 2006 and that additional submissions merely relate back to the original documentation provided. Counsel's assertions are not supported by the record, which contain counsel's original transmittal letter, dated April 13, 2006, relating to the concurrent submission of the beneficiary's application for permanent resident status (I-1485) and the I-140. It is further noted that the record contains the original envelope that was used to submit these applications. The earliest postmark was April 29, 2006 and the date of actual receipt by the Vermont Service Center was May, 1, 2006 as stamped on the envelope.

Counsel additionally contends that the PWD by the New York State Labor Department should have been \$29.71, valid from January 2006 until June 2006. Counsel attaches a DOL website indicating the prevailing wage during this period as \$29.71. He asserts that had the state DOL indicated the correct prevailing wage for the longer validity period, then the petition would not have been denied. He reiterates Ms. [REDACTED]'s claim that the difference in wages per hour didn't affect the attempted recruitment. Counsel further states that the exigencies of the beneficiary's situation in seeking to file his adjustment of status application when his student visa expired caused the process to be accelerated and precluded any investigation as to the state determination of the PWD.

The AAO does not find that the beneficiary's immigration status is relevant to whether the petitioner filed the I-140 within the validity period of the PWD. The submission of a copy of a DOL website pertinent to the prevailing wage of a registered nurse does not overcome the director's basis for denying the I-140. As noted above, the date of filing the I-140 designates the priority date of the petition. In this case the priority date is May 17, 2006 as indicated above. Pursuant to 20 C.F.R. § 656.15, CIS, not the DOL, reviews the Schedule A applications that are required to accompany the I-140. The validity period of the supporting SWA PWD must be reflective of the wages being offered for comparable positions at the time that the I-140 is filed or else the I-140 may not be approved and the corresponding priority date may not be retained. In this case, the AAO concurs with the director's decision to deny the I-140 because the application was not filed within the validity period of the PWD. Moreover, submitting additional documentation such as prevailing wage guidelines relevant to the DOL online resource does not serve to somehow amend a PWD that may have contained errors relevant to its issuance under 20 C.F.R. § 656.40(a) and (c). Regarding this issue, the AAO would emphasize that in these proceedings the burden is on the petitioner to establish that its request meets all requirements of the law for the relevant employment-based immigrant visa petition. Section 291 of the Act, 8 U.S.C. § 1361.

See also Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966). The AAO finds that it is the petitioner's responsibility to review the PWD form when it is received from the SWA and before it submits the form and/or its related petition(s) to CIS in order to make certain that the form complies with all statutory and regulatory requirements.

Beyond the decision of the director, it is noted that the notice of posting of the job opportunity intended to be posted in a 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, failed to contain an accurate and complete address of the Department of Labor Certifying Officer location where individuals may provide documentary evidence bearing on the application for certification under 20 C.F.R. § 656.10(d)(3)(iii). According to the DOL's Frequently Asked Questions (FAQs) found online at <http://www.foreignlaborcert.doleta.gov/faqs.cfm>, (Question 3 under Notice of Filing and Question 4 under How to File) the address of the DOL certifying officer for New York is located at:

United States Department of Labor
Employment and Training Administration
Atlanta National Processing Center
Harris Tower
233 Peachtree Street, N.E. , Ste. 410
Atlanta, Georgia 30303

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 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.

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ORDER: The appeal is dismissed.