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U.S. Citizenship
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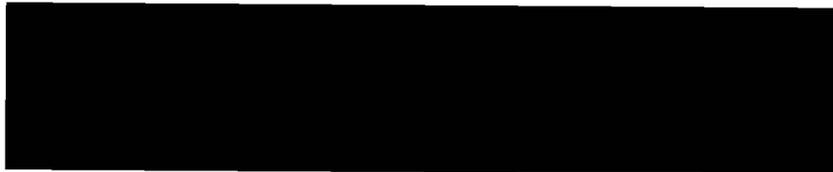
Office: CALIFORNIA SERVICE CENTER

Date: JUN 30 200

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

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, California Service Center, denied the preference visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a medical center. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for Schedule A, Group I labor certification pursuant to 20 C.F.R. § 656.5(a). The director determined that the petitioner had not established that it had properly posted the notice of filing an application for permanent employment certification for ten consecutive business days at the beneficiary's intended place of employment, that the notice of filing did not list the correct prevailing wage, and that the address of the appropriate Certifying Officer was not listed on the notice of filing. Therefore, the director denied the petition.

The record shows that the appeal is properly filed and timely. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 15, 2005 denial, the issues in this case are whether the petitioner established that it properly posted notice of filing an application for permanent employment certification for ten consecutive business days at the beneficiary's place of employment, whether the petitioner provided the correct prevailing wage on the notice of filing, and whether the petitioner correctly listed the address of the certifying officer on the notice of filing.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

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 granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as a registered nurse. Aliens who will be employed as professional nurses are listed on Schedule A. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.10 with respect to which the Director of the United States Employment Service has determined that 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 similarly employed.

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). In the instant case, the priority date is April 15, 2005.

The regulations set forth in Title 20 of the Code of Federal Regulations also provide specific guidance relevant to the requirements that an employer must follow in seeking certification under Group I of Schedule A. An

employer must file an application for a Schedule A labor certification with CIS. It must include evidence of prearranged employment for the alien beneficiary signified 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. § 656.20(g)(3), 20 C.F.R. § 656.22(a) and (b).

The regulation at 20 C.F.R. § 656.20 (2004)¹ states, in pertinent part,

(c) Job offers filed on behalf of aliens on the Application for Alien Employment Certification form must clearly show that:

- (1) The employer has enough funds available to pay the wage or salary offered the alien;
- (2) The wage offered equals or exceeds the prevailing wage determined pursuant to § 656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work

The prevailing wage rate is defined by the regulation at 20 C.F.R. § 656.40 as follows:

Determination of prevailing wage for labor certification purposes.

(a) Whether the wage or salary stated in a labor certification application involving a job offer equals the prevailing wage rate as required by [20 C.F.R. §]656.21(b)(3), shall be determined as follows:

(2) If the job opportunity is in an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes shall be:

(i) the average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages;

¹ 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. The current 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.

b) For purposes of this section, except as provided in paragraphs (c) and (d), “similarly employed” shall mean “having substantially comparable jobs in the occupational category in the area of intended employment”

The Department of Labor (DOL) maintains a website at www.ows.doleta.gov which provides access to an Online Wage Library (OWL). OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically.²

On April 15, 2005, the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse. 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.

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 Citizenship and Immigration Services (CIS) office. 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 § 656.10(d).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. 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 CIS or April 15, 2005. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$23.25 an hour or \$48,360 annually.³

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). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.⁴

² The OWL requires that the city, state, and county of the employment location be known in order to identify the prevailing wage rate.

³ It should be noted that the prevailing wage is \$23.26 per hour or \$48,380.80 annually.

⁴ 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*

Relevant evidence in the record includes counsel's brief, a copy of the posted notice, an offer of employment, a copy of a prevailing wage request from the California Employment Development Department, and a letter, dated January 9, 2006, from [REDACTED], RN MA, Vice President, Nursing Services, for the petitioner. The record does not contain any other documentation relevant to the issue of whether the petitioner properly posted notice of filing an application for permanent employment certification at its facility or whether it published such notice in its in-house media in accordance with those procedures used to announce the availability of vacancies similar to that which is the subject of the application for permanent employment certification in this matter.

The regulation at 20 C.F.R. § 656.10(d)(1) provides in relevant part:

In applications filed under §§ 656.15 (Schedule A), 656.16 (Shepherders), . . . 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:

- (i) To the bargaining representative(s) (if any) of the employer's employees...
- (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. Appropriate locations for posting notices of the job opportunity include locations in the immediate vicinity of the wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a). 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. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print that was used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

According to the regulation at 20 C.F.R. § 656.10(d)(3):

The notice of the filing of an Application for Permanent Employment Certification must:

- i. State 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
- iv. Be provided between 30 and 180 days before filing the application.

The record reflects that the petitioner posted notice of filing an application for permanent employment certification at its facility from May 23, 2005 through June 2, 2005. The regulation at 29 C.F.R. § 2510.3-120(e) defines a "business day" as "any day other than Saturday, Sunday or any other day designated as a holiday by the Federal Government." This office notes that May 28 and May 29 were on the weekend and that May 30th was a Federal holiday. Thus, the notice was posted for only eight consecutive business days. This office finds that this posting does not meet the requirements for posted notices to the employer's employees as set forth at 20 C.F.R. § 656.10(d)(1)(ii). In addition, the notice of filing was posted after the petition was filed with CIS on April 15, 2005. Therefore, the notice of filing did not meet the plain meaning of the regulation language at 20 C.F.R. § 656.10(d)(3)(iv) that states that the notification must have already been "provided between 30 and 180 days" before filing the petition and Form 9089 with CIS. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971), 8 C.F.R. § 103.2(b)(1), (12).

On appeal, counsel states that the timing on filing the Form I-140 was due to circumstances beyond the control of the petitioner. Counsel claims that CIS guidelines regarding prevailing wage, time to file the I-140, and related subjects was issued on June 15, 2005 by Mr. Yates, Associate Director and that the petitioner posted the notice of filing an application for permanent employment certification when no guideline was available. Revised DOL regulations related to Schedule A filings, however, were published and available in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. See 69 Fed. Reg. 77326 (Dec. 27, 2004).

The second issue in these proceedings is whether or not the notice of filing an application for permanent employment certification listed the correct prevailing wage.

One of the requirements to meet Schedule A eligibility is that the petitioner must obtain a prevailing wage determination from the relevant State Workforce Agency ("SWA") in compliance with 20 CFR § 656.40 prior to filing. 20 CFR § 656.40 provides:

(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 returns the form with its endorsement to the employer.

(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.

The petitioner only submitted the prevailing wage request in the response to the RFE, and not with the initial filing. The petitioner's wage request shows that it was submitted to the Employment Development Department ("EDD"), State of California, the relevant SWA, on May 24, 2005.⁵ The EDD made a determination on the wage request on July 6, 2005 and assessed a wage rate of \$23.26 per hour. As the wage

⁵ A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971), 8 C.F.R. § 103.2(b)(1), (12).

request was only submitted to the SWA after the petition was filed on April 15, 2005, the director found that the petition fails to comply with 20 CFR § 656.40. The director also determined that the wage offered to the beneficiary (\$23.25) and the wage range listed on the notice of filing (\$21.25 - \$25.00/hour) was less than the prevailing wage as listed on the Prevailing Wage Request form by the SWA (\$23.26).

On appeal, counsel submits a letter, dated January 9, 2006, from [REDACTED] RN MA, Vice President, Nursing Services, of the petitioner. In the letter, [REDACTED] states:

Between 5-23-2005 and 6-2-2005, I posted a "Notice of Filing of Application for Alien Employment" on the premise of our hospital. As a routine practice, the hospital usually sets a range of pay rather than a specific amount. That was why we set a range of \$21.25-\$25.00.

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).

In the case at hand, the petitioner obtained the PWD on July 6, 2005. The determination listed a validity period for the calendar year in which the PWD was issued or 2005. The DOL Online Wage Library previously assigned two levels of wages. As part of the Consolidated Appropriations Act of 2005 passed by Congress and signed into law on December 8, 2004, Section 4223 amends Section 212(p) of the INA to require that the employer offer 100% of the prevailing wage determined and disallows the prior 95% of pay rule. Further, the amendment provided that where the Secretary of Labor uses or makes available to employers a governmental survey to determine the prevailing wage, the salary shall provide at least four levels of wages commensurate with experience, education, and level of supervision. Therefore, both the Form 9089 and the posting notice must list the prevailing wage or offered wage for the position. It is insufficient to list the prevailing wage on one form and not the other. *See* 20 C.F.R. § 656.10(d)(6). In the instant case, the offered wage is lower than 100% of the prevailing wage.

The final issue in these proceedings is whether the address of the appropriate Certifying Officer was listed on the notice of filing.

The notice of filing of an application for alien employment certification states that it was provided as a result of the filing of an application for permanent alien labor certification and that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the Regional Certifying officer of the Department of Labor. It does not, however, provide the address of the appropriate Certifying Officer; and, therefore, the notice of filing does not meet the requirements of 20 C.F.R. § 656.10(d)(3)(iii).

On appeal, counsel states:

[The] beneficiary [...] was on F-1 visa before receiving her EAD and then she started working since June. If petitioner is forced to submit a new I-140, I-485, and I-765, [the beneficiary] will be out of status, has to stop working, and depart the U.S. This will cause irreparable harm to both her and petitioner. Since Petitioner did comply with rules as existed at the time of posting the notice, it should not be punished, which in turn makes [the beneficiary] a helpless and innocent victim. The circumstance was beyond the control of petitioner and relief, thus, is allowable at law or in equity.

The AAO has reviewed the record in this case, and concurs with the director's denial for the reasons expressed herein. Although Schedule A regulations are designed to address concerns regarding the shortage of healthcare workers such as registered nurses and physical therapists, this concern does not permit CIS to overlook the specific regulatory provisions relating to the petitioner's burden of meeting those regulatory requirements as of the priority date of April 15, 2005. In the instant case, the petitioner has not met those requirements.

For the above stated reasons, the AAO concurs with the director's decision that the petition may not be approved. Accordingly, 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, the petitioner has not met that burden.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.