

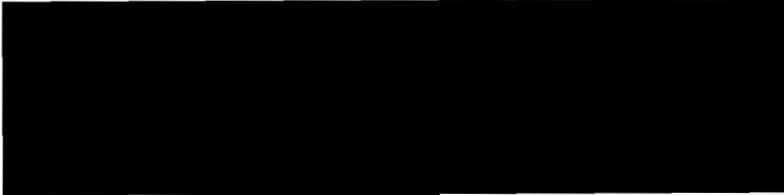
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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Services

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FILE: [REDACTED]
LIN 06 216 50911

Office: NEBRASKA SERVICE CENTER

Date: OCT 03 2008

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 nursing home. It seeks to employ the beneficiary permanently in the United States as a staff 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 with a properly completed labor certification. Specifically, the petitioner failed to submit a prevailing wage determination (PWD) entered by the State Workforce Agency (SWA) having jurisdiction over the proposed area of intended employment.

On appeal, the petitioner, through counsel, maintains that submission of a copy of a collective bargaining agreement between the petitioner and the New York State Nurses Association met the applicable requirements sufficient for the petition's approval.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 July 6, 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

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.

permanent employment of aliens filed on or after that date. Therefore these regulations apply to this case because the filing date is July 6, 2006.

The sole issue on appeal in this matter is whether the petitioner filed the I-140 with a properly completed ETA Form 9089 including a state prevailing wage determination issued by the 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 did not submit evidence of a SWA prevailing wage determination. In response to the director's request for evidence issued on February 15, 2007, instructing the petitioner to submit a SWA prevailing wage determination from the pertinent SWA having jurisdiction over the proposed location where the job opportunity exists, the petitioner, through counsel, submitted a copy of a collective bargaining agreement between the petitioner and the New York State Nurses Association.

The director denied the petition on May 9, 2007, concluding that since the petitioner had failed to submit the requested SWA prevailing wage determination, the petition could not be approved.

On appeal, counsel asserts that the director's request for a SWA prevailing wage determination is not relevant to the petition's eligibility for approval as the wage set forth in the petitioner's collective bargaining agreement is considered as not adversely affecting the wages of U.S. workers and is considered by the SWA to be the prevailing wage for purposes of an application for labor certification. Particularly in a shortage occupation such as nursing, counsel states that the failure to provide a SWA prevailing wage determination should only be considered as a minor deficiency as such determination would, in any event, identify the collective bargaining agreement prevailing wage.

Counsel's assertions are not persuasive. Pursuant to 20 C.F.R. § 656.40, the state workforce agency, not CIS, is empowered to make a determination of the prevailing wage for labor certification purposes, including those filed for Schedule A certification. As noted above, that determination, which specifies a validity period also triggers the employer's obligation to file its application or begin the recruitment required by the regulations. Moreover, clarification on this issue is provided by the DOL. According to the DOL's Frequently Asked Questions (FAQs) found online at <http://www.foreignlaborcert.doleta.gov/faqs.cfm>, (Question 4 under Prevailing Wage) the following information is provided:

Must the employer request a prevailing wage from a State Workforce Agency (SWA) if a Collective Bargaining Agreement exists or the employer is choosing to use a Davis-Bacon Act or McNamara-O'Hara Service Contract Act Wage?

Yes, the employer must always request a prevailing wage from the SWA having jurisdiction over the proposed area of intended employment. The SWA is responsible for evaluating whether the wage source chosen by the employer is applicable and/or acceptable.

Beyond the decision of the director, it is noted that the request for evidence advised the petitioner to provide evidence of its notice of posting of the job opportunity, pursuant to the requirements of the regulation at 20 C.F.R. § 656.10(d), which states in pertinent part:

(1) In applications filed under Section 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:

(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. Documentation may consist of a copy of the letter

and a copy of the Application for Permanent Employment Certification form that was sent to the bargaining representative.

(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 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 were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

Although the petitioner's response included a copy of a notice of posting of a job opportunity that was posted on the petitioner's premises, this posting procedure does not comply with the regulatory requirement where there is a bargaining representative, as noted in section 2.03 of the petitioner's collective bargaining agreement contained in the record. As noted above, 20 C.F.R. § 656.10(d)(1)(i) requires evidence that notice of the job opportunity was provided to the bargaining representative such as a copy of the letter and a copy of the application for employment certification that was sent to this individual.

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.

ORDER: The appeal is dismissed.