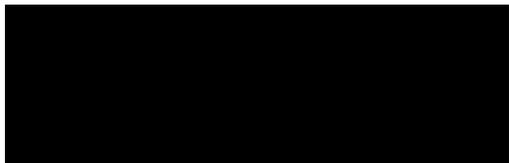




U.S. Citizenship
and Immigration
Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY



56

FILE: [REDACTED]
LIN 07 023 53258

Office: NEBRASKA SERVICE CENTER

Date: **SEP 24 2008**

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:

SELF-REPRESENTED

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, Nebraska 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 healthcare staffing company. It seeks to employ the beneficiary permanently in the United States as a registered nurse. A Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 or labor certification) accompanied the petition. 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 notice of filing an application for permanent employment certification for ten consecutive business days at the beneficiary's intended place of employment. 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 November 7, 2006 denial, the primary issue in this case is 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.

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.

On October 31, 2006, 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.¹ 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.

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. New Department of Labor (DOL) 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. Thus, PERM applies to the instant case.

- 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 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.² On appeal, the petitioner submits a letter dated December 6, 2006; and an Attestation of Posted Job Notice and a Posted Notice of Employment signed by [REDACTED] on November 9, 2006, indicating that a notice of filing an application for permanent employment certification was posted from September 1, 2006 to September 30, 2006 at Central Vermont Hospital in Barre, Vermont.

Relevant evidence in the record includes a Posted Notice of Employment indicating that a notice of filing an application for permanent employment certification was posted from September 4, 2006 to September 15, 2006 at Central Vermont Hospital in Barre, Vermont; and a General Notice indicating that a notice of filing an application for permanent employment certification was posted from September 4, 2006 to September 15, 2006 at the University of New Mexico in Albuquerque, New Mexico, and at Central Vermont Hospital in Barre, Vermont. 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.

Under 20 C.F.R. § 656.10(d)(1), the regulations require the following:

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:

- (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

² 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).

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.

Additionally, 20 C.F.R. § 656.20(d)(3) requires the following:

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 petitioner submitted three posting notices in connection with the instant case.³ With the petition, the petitioner submitted a Posted Notice of Employment indicating that a notice of filing an application for permanent employment certification was posted from September 4, 2006 to September 15, 2006 at Central Vermont Hospital in Barre, Vermont.⁴ The petitioner also submitted a General Notice indicating that a notice of filing an application for permanent employment certification was posted from September 4, 2006 to September 15, 2006 at the University of New Mexico in Albuquerque, New Mexico, and at Central Vermont Hospital in Barre, Vermont.⁵ As noted by the director in his decision, September 4, 2006 was a Federal holiday and September 9, 2006 and September 10, 2006 fell on a weekend.⁶ Thus, the notices were not posted for the required ten consecutive business days. This office finds that these postings do 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).

Further, the posting notice submitted on appeal does not meet the regulatory requirements governing posting requirements. On appeal, the petitioner submitted an Attestation of Posted Job Notice and a Posted Notice of Employment signed by ██████████ on November 9, 2006, indicating that a notice of filing an application for permanent employment certification was posted from September 1, 2006 to September 30, 2006 at Central

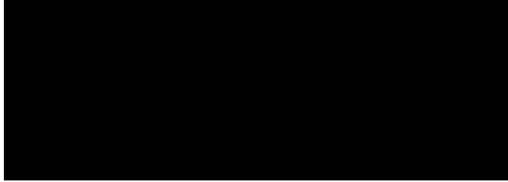
³ Since the initial postings do not meet the regulatory requirements governing posting requirements, any subsequent effort by the petitioner to correct the notice of posting would constitute a material change to the petition. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). The petitioner must establish eligibility at the time the Form I-140 was filed. See 8 C.F.R. § 103.2(b)(12).

⁴ Although the ETA Form 9089 and the Form I-140 do not list the address where the beneficiary will work, a letter dated September 2006 from the petitioner indicates that the place of intended employment is ██████████

⁵ The petitioner has provided no explanation as to why two separate posting notices were submitted.

⁶ Weekends and federal holidays are not "business" days. See www.foreignlaborcert.doleta.gov/faqsanswers.cfm (accessed September 8, 2008).

Vermont Hospital in Barre, Vermont.⁷ While the notice was posted for the required ten consecutive business days, it did not provide the address of the appropriate Certifying Officer as required by 20 C.F.R. § 656.20(d)(3)(iv). For employment in Vermont, the proper address of the appropriate Certifying Officer⁸ is:



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. § 656.20(d)(3)(iv).

Beyond the decision of the director, the petitioner has not established its continuing ability to pay the proffered wage. 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:

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.

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). 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 on October 31, 2006. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$835.00 per week or \$43,420.00 annually.

With the petition, the petitioner submitted two letters dated September 2006 from [REDACTED], the petitioner's President and Treasurer stating that the petitioner has over 100 employees and certifying that the petitioner has the ability to pay the proffered wage for the beneficiary. Neither letter names the beneficiary. Further, only one letter states the proffered wage, which is listed in the letter as \$41,600. The actual proffered wage is \$43,420.00. As set forth above, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That regulation further provides: "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." (Emphasis added)

⁷ This office notes that unlike the notices submitted with the petition, the notice submitted on appeal does not indicate that it was posted at the University of New Mexico in Albuquerque, New Mexico.

⁸ *See* <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#notefile3> (accessed July 31, 2008).

CIS electronic records show that the petitioner has filed 224 other I-140 petitions. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). The record in the instant case contains no information about the proffered wage for the beneficiaries of those petitions, about the current immigration status of the beneficiaries, whether the beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. Furthermore, no information is provided about the current employment status of the beneficiaries, the date of any hiring and any current wages of the beneficiaries. Given the record as a whole and the petitioner's history of filing petitions, we find that CIS need not exercise its discretion to accept the letter from the petitioner's President and Treasurer. The petitioner has submitted no other financial documentation required by 8 C.F.R. § 204.5(g)(2) to establish its ability to pay the proffered wage. Instead the petitioner provided a copy of its payroll report dated February 25, 2006, which states the petitioner's annual salary payments for 2005. Showing that the petitioner paid wages in excess of the proffered wage is insufficient to establish the petitioner's ability to pay the proffered wage in the instant case. Therefore, the petitioner has not established its continuing ability to pay the proffered wage.

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.⁹

ORDER: The appeal is dismissed.

⁹ This office notes that the employment contract between the petitioner and the beneficiary dated September 30, 2006, is for a fixed term of employment. If the petitioner pursues this matter further, it must establish that the position offered is a permanent, full-time position.