U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 16 2007

WAC 05 213 51620

IN RE: Petitioner: [redacted]
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:

[redacted]

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[1] was denied by the Director, California 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 Schedule A, Group I labor certification pursuant to 20 C.F.R. § 656.5(a). The director determined that the petitioner had submitted a Prevailing Wage Determination (PWD) obtained from the State Workforce Agency (SWA) with a validity period after the filing date of the I-140 petition, and, that the notice of filing an application for permanent employment certification was posted at less than the prevailing wage. 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 April 25, 2006, denial, issues in this case are whether the petitioner had submitted a valid Prevailing Wage Determination obtained from the State Workforce Agency (SWA) and whether the notice of filing an application for permanent employment certification was posted at less than the prevailing wage.

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. This section also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

On July 27, 2005,[2] 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(b), a Schedule A application shall include:

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[1] The chronology of the filings and documentation in this matter are as follows: The petitioner posted notice of filing an application for permanent employment certification beginning on May 25, 2005; the petitioner submitted an I-140 petition on June 22, 2005 but it was returned by Citizenship and Immigration Services (CIS); a I-140 petition was filed on July 27, 2005 along with a Form ETA 750 dated by the employer on July 12, 2005; a Prevailing Wage Determination was obtained by the petitioner from the State Workforce Agency (SWA) with a validity period of September 21, 2005 stating a prevailing wage of $33.87 for the offered job and submitted to CIS; an ETA Form 9089 dated October 4, 2005 was submitted to CIS on October 11, 2005; and, the director denied the petition on April 25, 2006.

[2] A receipt date is assigned upon the proper filing of the petition with the required filing fee. *See* 8 CFR §§ 103.2(a), and, 103.2(a)(7)(i). The petition as originally submitted on June 22, 2005, was returned to the petitioner for corrections.

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 petition was properly filed with CIS which in this instance is July 27, 2005. The regulation at 8 C.F.R. § 204.5(d) states:

> *Priority date.* The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an individual labor certification from the Department of Labor shall be the date the request for certification was accepted for processing by any office within the employment service system of the Department of Labor. The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation within the Department of Labor's Labor Market Information Pilot Program shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with ... [CIS].

The AAO takes a *de novo* look at issues raised in the denial of the petition. *See 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.[3]

Relevant evidence in the record includes the following: a U.S. Department of Labor, ETA Form 9089 dated by the employer on October 4, 2005, and by the beneficiary on October 5, 2005; an explanatory letter from attorney [redacted] dated October 6, 2005; a letter from [redacted] Director of Behavioral Medicine Services, of the petitioner dated February 21, 2005; a Prevailing Wage Determination obtained from the Employment Development Department, State of California, dated September 21, 2005, for the job title registered nurse , skill level 4, stating a prevailing wage for the job title of $33.87 per hour; a letter and certification of posting from the petitioner dated October 4, 2005, by [redacted] Controller, finance department with notice of filing an application for permanent employment certification for the subject job of registered nurse at a rate of pay indicating as a pay range $30.34 - $37.41 per hour (the notice stated that it was posted on May 25, 2005 and its removal date was indicated as "present"); a Form ETA 750, Application for Alien Employment Certification dated by the employer as July 12, 2005, and by the beneficiary as July 11, 2005; a letter from the petitioner dated May 26, 2005, by [redacted] Director, Human Resources; a letter from the petitioner dated May 23, 2005, by [redacted], **CFO/Senior** Vice President, finance department; the beneficiary's license as a registered nurse issued by the State of California as well as other documentation concerning the beneficiary's qualifications as well as other documentation.

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

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[3] 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).

> In applications filed under §§ 656.15 (Schedule A), 656.16 . . . 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:
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> (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;
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> ii. State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
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> 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 25, 2005 and its removal date was indicated on the certification of posting as "present."[4] According to the regulation at 20 C.F.R. § 656.10(d)(3)(iv) the latest dates that a notice of filing an application for permanent employment certification could have occurred in the present instance were between 30 and 180 days before filing the ETA Form 9089 on July 27, 2005. Since the Prevailing Wage Determination with a validity period of September 21, 2005 was not received by the petitioner until after the

[4] Because the petitioner did not provide an end-date when posting ceased, it is impossible to know how long the notice was posted. There is no objective way to ascertain from the notice and the letter dated October 4, 2005, to which the notice/certification was attached, how long the notice was posted.

posting commencing on May 25, 2005, and, although the petitioner has not complied with the regulation at 20 C.F.R. § 656.10(d)(3)(iv), since the petitioner did not have a prevailing wage with which to include in the notice, the notice was defective for that reason also. Therefore, the notice of filing an application for permanent employment certification posted commencing on May 25, 2005, is invalid on its face. We also find that the petitioner had submitted a Prevailing Wage Determination obtained from the State Workforce Agency (SWA) with a validity period after the filing date of the I-140 petition.

Beyond the decision of the director, the petitioner failed to demonstrate that it published notice of filing an application for permanent employment certification in its in-house media in accordance with the normal procedures used for the recruitment of similar positions in its organization, which is an additional requirement set forth at 20 C.F.R. § 656.10(d)(1)(ii). The record contains no evidence that the petitioner ever published notice of filing an application for permanent employment certification for a registered nurse position in any in-house publication for job vacancies or in any other of its in-house media in accordance with the normal procedures used for the recruitment of registered nurse in the petitioner's organization, as required by the regulations. *See* 20 C.F.R. § 656.10(d)(1)(ii). 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). The petitioner must establish eligibility at the time the Form I-140 was filed. *See* 8 C.F.R. § 103.2(b)(12). Thus, this deficiency would not be overcome were the petitioner to publish notice of its application for employment certification at this date.

The director found that the notice of filing an application for permanent employment certification was posted at less than the prevailing wage. The prevailing wage was established when a Prevailing Wage Determination was obtained by the petitioner from the Employment Development Department, State of California, dated September 21, 2005, for the job title registered nurse, skill level 4, stating a prevailing wage for the job title of $33.87 per hour. The petitioner has submitted and there is in the record of proceeding a letter October 4, 2005 and a certification of posting commencing on May 25, 2005 to 'present" by [redacted] Controller, finance department for the subject job of registered nurse at a rate of pay indicating as a pay range $30.34 - $37.41 per hour. Since $30.34 per hour is below the prevailing wage of $33.87 per hour, the notice is on it face defective. According to counsel's explanatory letter dated October 6, 2005, the beneficiary actually earns more than $30.73 per hour because the beneficiary receives other remunerations and allowances such as housing, and, night shift wage rate differential. However, that is not the criteria. As noted above, regulations require that the offered job be posted and notice given according to the wage stated in the Prevailing Wage Determination. We find that the notice of filing an application for permanent employment certification was posted at less than the prevailing wage.

We find that that the petitioner had submitted a Prevailing Wage Determination (PWD) obtained from the State Workforce Agency (SWA) with a validity period after the filing date of the I-140 petition, that the petitioner had not established that it properly posted notice of filing an application for permanent employment certification, and, that the notice of filing an application for permanent employment certification was posted at less than the prevailing 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, that burden has not been met.

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.