U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAY 24 2007

WAC-05-207-50842

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:

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

The petitioner is in the business of nursing home management, and seeks to employ the beneficiary permanently in the United States as a registered nurse, a professional or skilled worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1153(b)(3).

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(2), and 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 nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(3)(ii). For the beneficiary to qualify, the petitioner must show that it has the ability to pay the beneficiary the proffered wage, and that the beneficiary meets the qualifications set forth in the certified labor certification. *See* 8 C.F.R. § 204.5(g)(2).

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the Department of Labor ("DOL") has determined that there are not sufficient United States 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 United States workers similarly employed.

Based on 8 C.F.R. § 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file Form I-140, "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."[1] 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).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced 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. § 656.10(d). Also, according to 20 C.F.R. § 656.15, aliens who will be permanently employed as professional nurses must have: (1) passed the Commission on Graduates of Foreign Nursing Schools ("CGFNS") Examination, or (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment, or that the alien has passed the National Council Licensure Examination for Registered Nurses ("NCLEX-RN").

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[1] On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program ("PERM"), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

Additionally, the petitioner must demonstrate its ability to pay the proffered wage. 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.

In the case at hand, the petitioner submitted the Application for Permanent Employment Certification, ETA 9089, with the I-140 Immigrant Petition on July 11, 2005, which is the priority date.[2] The petitioner failed to state the proffered wage on the Form ETA 9089 as required.[3] The petitioner did submit a completed prevailing wage determination subsequent to filing in response to a Request for Evidence ("RFE"), which provided that the wage for the position of a nurse is $32.92 per hour, 40 hours per week, which equates to an annual salary of $68,473.60. On the I-140 petition filed, the petitioner listed the following information: established: 1990; gross annual income: $48 million; net annual income: $2.4 million; and current number of employees: over 1,000.

On September 5, 2005, the director issued an RFE for the petitioner to submit: Form ETA 9089 fully executed in duplicate; a valid prevailing wage determination issued by the state workforce agency ("SWA") having jurisdiction over the proposed area of employment; evidence of the petitioner's ability to pay in the form of federal tax returns, annual report, or audited financial statement; and a signed statement from the company's financial officer regarding its ability to pay; evidence that the position was properly posted for the required ten consecutive business day time period; and evidence of the contract between the petitioner and the beneficiary. The petitioner responded.

On December 14, 2005, the director denied the petition on the basis that the petitioner failed to properly post the position in accordance with 20 CFR § 656.10(d)(1). The petitioner did not list the proper wage in accordance with the SWA determination. Accordingly, the petition did not qualify for Schedule A certification, and was denied. The petitioner appealed and the matter is now before the AAO.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[4].

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[2] The petitioner previously filed an I-140 on behalf of the beneficiary on October 30, 2003. The petition was denied to due abandonment as the petitioner failed to respond to the director's Request for Additional Evidence.

[3] *See* 20 C.F.R. § 656.10(c)(1); *see also* Application for Permanent Employment Certification, Form ETA 9089 – Instructions, Section G, Wage Offer Information.

[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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The record shows that the appeal is properly filed, timely and makes an allegation of error in law or fact. 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.

On appeal, the petitioner[5] provides that:

> [CIS] erred in concluding that petitioner failed to post the notice in compliance with 20 C.F.R. 656.10, when in fact it did; the service erred in concluding that petitioner did not submit documentation to show that the position qualifies for Schedule A certification, when in fact it did; the service erred in not considering other company benefits as part of the wage of the employee for purposes of application of the prevailing wage requirements for alien labor certification.

We note that the petition's denial involves one issue: the improper posting notice. Based on the improper posting notice, the petition did not qualify for Schedule A certification.

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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).

One of the requirements to meet Schedule A eligibility is that the petitioner is required to post the position in accordance with 20 C.F.R. § 656.10(d), which provides:

> (1) In applications filed under § 656.15 (Schedule A), § 656.16 (Sheepherders), § 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:
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> . . .
>
> (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.
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> (3) The notice of the filing of an Application for Permanent Employment Certification shall:
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> (i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;

[5] The petitioner was represented by counsel in the underlying filing, but filed the appeal self-represented.

> (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.
> . . .
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> (6) If an application is filed under the Schedule A procedures at § 656.15. . . the notice must contain a description of the job and rate of pay and meet the requirements of this section.

Additionally, Section 212 (a)(5)(A)(i) of the Act states the following:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified . . . that
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> (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

Fundamental to these provisions is the need to ensure that there are no qualified U.S. workers available for the position prior to filing. The required posting notice seeks to allow any person with evidence related to the application to notify the appropriate DOL officer prior to petition filing. *See* the Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); *see also* Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).

A petitioner is also required to obtain a prevailing wage determination from the relevant State Workforce Agency ("SWA") in compliance with 20 CFR § 656.40 prior to filing. The petitioner only submitted the prevailing wage request in response to the RFE request, 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 September 14, 2005.[6] The EDD made a determination on the wage request on October 18, 2005 and assessed a wage rate of $32.92.

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[6] Accordingly, the petition failed to meet Schedule A eligibility at the time of filing based on this aspect as well as the posting notice. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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). Further, the petitioner failed to initially submit a fully executed Form ETA 9089 in duplicate. The petitioner did provide a duplicate copy of the ETA 9089 in response to the RFE, however, the submitted version was deficient in that it did not properly list the prevailing wage information on page 2, Section F, or the wage offered in Section G. 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*

To be eligible for a Schedule A petition, as set forth above the petitioner would need to have posted the position pursuant to 20 CFR § 656.10(d)(3)(iv) 30 to 180 days prior to the July 11, 2005 filing, and have met the other requirements of 20 CFR § 656.10(d).

The petitioner posted the notice from May 16, 2005 to June 7, 2005. The notice listed the job title, and position duties, as required, but listed the pay rate as $30.30, which is below the SWA wage determination of $32.92. Accordingly, the posting notice was deficient as it did not list the position's proper wage and apprise interested workers of the job's wage in accordance with 20 C.F.R. § 656.10(d)(1)(ii)(6).

The petition was accordingly denied. On appeal, the petitioner provides the following arguments: (1) that if fringe benefits, which the petitioner pays, were taken into consideration, the difference between the posted wage and the proffered wage would be met; (2) similarly, the petitioner argues that the petitioner's proffered wage of $30.30 listed on the posting notice does not account for fringe benefits which the beneficiary receives; (4) that the petitioner is required to pay the $32.92 rate upon the beneficiary's obtaining permanent residence; and (5) the petitioner intended the entry level wage rate or "level 1" for the position, and the SWA assigned the position a level 2 wage.

We note that all of the petitioner's arguments mistake the main issue. The posting notice must properly apprise any interested workers of the job opportunity and the wage for the position prior to filing. The posting notice filed with the petition did not match the required prevailing wage for the skills listed as determined by the relevant SWA. Accordingly, any argument that the wage difference is small, or can be accounted for by other pay or benefits is not relevant. The posting notice did not list the proper wage prior to filing.

Regarding the petitioner's argument that the position is a "level 1" and not a "level 2" wage,[7] the wage that the petitioner believes the position is, is not the relevant factor. The SWA in determining the proffered wage examines the position description, education and experience required to determine the proper wage level.[8] Following consideration of the position description, and education, the SWA assigned the wage.

Accordingly, the petition was properly denied as the petitioner did not satisfy all of the filing requirements for a Schedule A petition at the time of filing.

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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).

[7] 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 423 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.

[8] We note that in the petitioner's initial filing the petitioner listed the position requirements as a Bachelor's degree and two years of experience. In the present filing, the petitioner dropped the experience requirement, and only required a Bachelor's degree. The position description, pay, and all other aspects of the position remain the same. It is unclear why the position previously required education and experience, and upon refilling, only required education, but no prior experience.

Further, although not raised in the director's decision, the petitioner as listed is not the intended employer. 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 petitioner listed on the ETA 9089 is Employee Equity Administration Inc. d/b/a Westline Medical Management, with a Federal Employment Identification Number of: [redacted], and an address of [redacted], Alameda, CA 94501. The beneficiary will be employed at: Oak Facility, Inc. FEIN: [redacted], with an address of [redacted] On appeal, the petitioner submitted the beneficiary's Form W-2 for 2005 exhibiting that she was paid by Oakland Care Center, FEIN, [redacted]

An employer is defined as an entity with the same FEIN. *See* 8 C.F.R. § 656.17(i)5(i). As Oakland Care Center and Employee Equity Administration Inc. d/b/a Westline Medical Management have different tax identification numbers, the two entities would be considered separate employers. If the beneficiary is working at Oakland Care and paid by Oakland Care, Oakland Care would be the proper petitioner.[9]

In determining the actual employer, the regulation at 20 C.F.R. § 656.3 provides:

> Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm or corporation.

In *Matter of Smith*, 12 I&N Dec. 772 (1968), the petitioner, a staffing service, provided a continuous supply of secretaries to third-party clients. The district director determined that the staffing service, rather than its clients, was the beneficiary's actual employer. To reach this conclusion, the director looked to the fact that the staffing service would make contributions to the beneficiary's social security, worker's compensation, and unemployment insurance programs; would withhold federal and state income taxes; and would provide other benefits such as group insurance. *Id.* At 773.

In *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), a firm sought to utilize the H-1B nonimmigrant visa program and temporarily outsource its aeronautical engineers to third-party clients on a continuing basis with one-year contracts. In *Ord*, the Regional Commission determined that the petitioning firm was the beneficiary's actual employer, not its clients, in part because it was between an employer and a job seeker, but had the authority to retain its employees for multiple outsourcing projects.

In *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), the petitioner sought to utilize the H-2B program to employ machinists who were to be outsourced to third-party clients. The commissioner again determined that

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[9] The petitioner submitted a Facilities Management Agreement that Employee Equity Administration Inc. (the "Manager") manages the Oakland Care ("Licensee") facility. The agreement provides that the "manager shall be an independent contractor and not licensee's employee. The agreement relates to management of the facilities generally, and provides that the manager will "oversee all personnel employed by Licensee in connection with the facility."

were a staffing service does more than refer potential employees to other employers for a fee, where it retains its employees on its payroll, etc. The staffing service rather than the end-user is the actual employer. *Id.*

In the present case, the employee will be based at Oakland Care Center, the entity which pays her salary, and taxes. Accordingly, we find that Oakland Care is the proper petitioner.

Based on the foregoing, the petitioner failed to meet the posting requirements as set forth in 20 C.F.R. § 656.10(d). Further, the petitioner did not list the proper employer.

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, that burden has not been met.

ORDER: The appeal is dismissed.