U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 31 2008

SRC 06 162 51626

IN RE: Petitioner:
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:

[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 was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The nature of the petitioner's business is a placement agency. It seeks to employ the beneficiary permanently in the United States as registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5(a), Schedule A, Group I.[1] The director determined that the evidence submitted does not demonstrate that the notice of filing the Application for Permanent Employment Certification was made according to the regulation at 20 C.F.R. § 656.10(d)(1)(i) and (ii). Specifically the director found the posting notice was posted at one of the petitioner's business locations, although it has three locations in the State of New York and one location in the State of New Jersey. The director noted that the form ETA 9809 does not list the location where the beneficiary was to work. Accordingly, for the reasons stated above, the director denied the petition.

Issues in this case are whether or not the notice of filing the Application for Permanent Employment Certification was made according to the regulation at 20 C.F.R. § 656.10(d)(1)(i) and (ii), whether or not the Form ETA-9089 was defective on its face (lacking a statement of the prevailing wage and its source as well as job opportunity information where the work will be performed); and whether or not the petitioner has demonstrated its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Notice of the Filing of the Application for Permanent Employment Certification

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.

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 filed with Citizenship and Immigration Services (CIS) which was April 26, 2006. See 8 C.F.R. § 204.5(d).

On April 26, 2006, the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, for classification of the beneficiary under section 203(b)(3)(A)(ii) 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(a) 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.

---

[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 U.S. Department of Labor (DOL) regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM, for Program Electronic Review Management. 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. The petition and the blanket labor certification were accepted April 26, 2006. This citation and the citations that follow are to the DOL PERM regulations.

The regulation at 20 C.F.R. §656.15(c)(2) specifies that professional nurses are among those qualified for Schedule A designation if they have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, hold a full and unrestricted license to practice professional nursing in the State of intended employment, or have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) administered by the National Council of State Boards of Nursing.

The regulation at 20 C.F.R. § 656.15 states in pertinent part for applications for labor certification for the Schedule A occupation of professional nurse the following:

> (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 Sec. 656.40 and Sec. 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 Sec. 656.10(d).
> (c) Group I documentation. An employer seeking labor certification under Group I of Schedule A must file with DHS, as part of its labor certification application, documentary evidence of the following:
>
> * * *
>
> (2) An employer seeking a Schedule A labor certification for an alien to be employed as a professional nurse (Sec. 656.5(a)(2)) must file as part of its labor certification application documentation that the alien has received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); that the alien holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment; or that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). Application for certification of employment as a professional nurse may be made only under this Sec. 656.15(c) and not under Sec. 656.17.

The regulation at 20 C.F.R. § 656.10(d)(1)(i) and (ii) states in pertinent part the following:

> In applications filed under Sec. Sec. 656.15 ... (Schedule A), 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 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.

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 pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

Relevant evidence in the record includes the following: letters from counsel dated April 4, 2006 and December 12, 2006; the ETA Form 9089 dated by the petitioner's representative on April 25, 2006; a letter from the petitioner dated April 17, 2006; a certification by [redacted], president of the petitioner entitled "Notice of Filing of Application under the U.S. Department of Labor's Permanent Certification Program;"[3] a copy of a web page entitled "Online Wage Library - OES Wage Search Results" accessed November 11, 2005 for the occupation of registered nurse; the beneficiary's license from the State of Vermont to practice as a registered nurse; the beneficiary's nurse registration certificate from the Government of Guyana; the beneficiary's International Commission on Healthcare Professions (ICHP)) certificate for the profession of registered nurse issued February 22, 2006; five continuing education certificates attained by the beneficiary; a fax from the New York State Department of Labor dated January 9, 2006 providing a prevailing wage determination for the occupation of registered nurse in New York City, New York; a letter from the petitioner to St. Roses Home, New York, New York dated August 11, 2005, with attachments; an exhibit entitled "Facility Descriptions;" an "Agreement for Supplemental Staffing Services" between Broadlane, Inc. and the petitioner

---

[2] The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

[3] The notice is incomplete. It does not provide the address of the appropriate certifying officer and there is no evidence that the job was published in the petitioner's in-house media. *See* 20 C.F.R. § 656.10(d)(3)(iii) and 20 C.F.R. § 656.10(d)(1)(ii).

dated September 15, 2004; a "Staffing Agreement between GT Systems, Inc. and Staten Island University Hospital" effective October 1, 2001; an "Agreement" dated February 1, 2006; a "Service Fee Agreement Letter" between the petitioner and the Daughters of Jacob Health Services dated July 27, 2006; a letter from the beneficiary dated November 29, 2007; and the beneficiary's licensing certificate (and registration certificate) from the education department of the University of the State of New York dated March 27, 2007.

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.

On appeal, counsel submits a legal brief that states that the denial of the petition "was based on a technicality." The technicality is not disclosed by counsel in her brief. Further, counsel states that the documents previously submitted complied with the director's request, and "The [director's] decision, though [sic] unfairly denied the petition because the decision was based on a ground upon which the petitioner was not given an opportunity to respond to [sic]."[4] This appeal is that opportunity. Counsel has not explained her assertions, submitted additional evidence or cited case precedent to support the appeal's assertions.

The only evidence relating to posting in the record of proceeding is a certification by president of the petitioner entitled "Notice of Filing of Application under the U.S. Department of Labor's Permanent Certification Program." The certification stated that the petitioner posted notice of filing an application for permanent employment certification at 295 Madison Avenue, New York, New York from Monday, February 20, 2006, through Friday, March 3, 2006 but the job location was left blank.

The petitioner has introduced several medical staffing contract agreements with medical facilities with multiple locations throughout New York City, Rockville Centre, Patchogue, Brooklyn, among other locations in New York State. These contracts are mentioned in this discussion as exhibits submitted by the petitioner.

The director in her decision also stated that in the event an employer does not know where the Schedule A employee will be placed, then in that case, the employer must post the notice at the work-sites of all its locations or clients (under contract) and also publish the notice in its in-house media publication according to the regulation at 20 C.F.R. § 656.10(d)(1)(ii). The petitioner did not do this.

According to the petition, the petitioner stated it is a placement agency and exhibits were introduced demonstrating the existence of contracts with healthcare facilities that would be where the petitioner's nurses and presumably the beneficiary would physically work. No evidence was submitted that the beneficiary will be employed at the petitioner's offices at [redacted], New York, New York. There is no evidence that the petitioner posted notice at all of the healthcare facilities and hospitals with whom the petitioner has contractual agreements for medical staffing. Therefore, the petition failed to comply with the regulation at 20 C.F.R. § 656.10(d).

---

[4] The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. There is no regulatory requirement for CIS to issue such a request. When petitions on their face, do or do not demonstrate eligibility for the preference visa classification sought, the director may review and act upon the petition as submitted. The regulation at 8 C.F.R. § 103.2(b)(8) provides that an application or petition may be denied if there is clear evidence of ineligibility, notwithstanding the lack of initial evidence. Clear ineligibility exists when an applicant or petitioner does not meet a basic statutory or regulatory requirement.

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 produce a new Form ETA-9089 or publish a new notice of its application for employment certification after the priority date.

The Form ETA 9089 and the Prevailing Wage Determination (PWD)

Although not addressed by the director, neither the prevailing wage nor the location where the work was to be performed was stated on the Form ETA-9089 accompanying the petition. Those portions of the labor certification were left blank by the petitioner.[5]

However, in the record of proceeding there is a fax from the New York State Department of Labor dated January 9, 2006 providing a prevailing wage determination (PWD) for the occupation of registered nurse in New York City, New York, for L. Mwakalundwa;[6] as required by the regulation at 20 C.F.R. §§ 656. 40 and 656.41, but no reference on the Form ETA-9089 to the prevailing wage source or the prevailing wage. The petitioner has not demonstrated that the Application for Permanent Employment Certification was approvable when submitted.

Ability to Pay the Proffered Wage

Beyond the decision of the director, another issue in this case is whether the petitioner has demonstrated its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 regulation at 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

---

[5] Other sections of the Form ETA 9089 left blank by the petitioner were sections H.5.b, the field of training, H.15, specific skills or other requirements, questions under I.a.2-A, concerning competitive recruitment and I.a.2-B, concerning the recruitment process, I.c. and I.d concerning job advertising information job fair and internal in-house media, employee referral and ethnic newspaper notice of the application, and section K, the alien's work experience. All of the sections were left blank in the application Form

[6] Further, the PWD indicates that the job requires at least two years of training, but the Form ETA 9089 submitted by the petitioner indicates no training is required. While a petitioner may use the same PWD for more than one application, the PWD must be for the same occupation, skill level, and same area of employment.

shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

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 26, 2006. *See* 8 C.F.R. § 204.5(d). The proffered wage is $26.00 per hour ($54,080.00) per year.

Relevant evidence in the record includes copies of the following documents: the Form ETA 9089 Application for Permanent Employment Certification; ;" a copy of a web page entitled "Online Wage Library - OES wage Search Results" accessed November 11, 2005 for the occupation of registered nurse; a fax from the New York State Department of Labor dated January 9, 2006 providing a PWD for the occupation of registered nurse in New York City, New York; a letter from the petitioner to St. Roses Home, New York, New York dated August 11, 2005, with attachments; an exhibit entitled "Facility Descriptions;" an "Agreement for Supplemental Staffing Services" between Broadlane, Inc. and the petitioner dated September 15, 2004; a "Staffing Agreement between GT Systems, Inc. and Staten Island University Hospital" effective October 1, 2001; an "Agreement" dated February 1, 2006; and a "Service Fee Agreement Letter" between the petitioner and the Daughters of Jacob Health Services dated July 27, 2006.

The PWD stated the prevailing wage of $25.62 per hour or $53,289.60 per year.

On the petition, the petitioner claimed to have been established in 2001 and to currently employ 228 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The petitioner's net annual income and gross annual income were not stated on the petition. On the Form ETA 9089, signed by the beneficiary on April 25, 2006, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a petition with the Form ETA 9089 Application for Permanent Employment Certification establishes a priority date, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. 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). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal

income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

CIS electronic records indicate that the petitioner has filed 87 other I-140 petitions[7] which have been pending during the time period relevant to the instant petition. 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 (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 wages for the beneficiaries of the other 87 I-140 petitions submitted by the petitioner, nor about the current immigration status of those beneficiaries, whether those beneficiary have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to those beneficiaries. Furthermore, no information is provided about the current employment status of those beneficiaries, the date of any hirings of beneficiaries and any current wages of those beneficiaries.

Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner, or to other beneficiaries for whom the petitioner might wish to submit I-140 petitions based on the same approved ETA 750 or ETA 9089's labor certifications.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

---

[7] According to the regulation at 8 C.F.R. § 204.5(g)(2), "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." The petitioner has submitted a letter dated April 17, 2006, from its president stating that it has 170 employees. However, the large number of pending petitions would increase the petitioner's employee roster by over 50% and, under the factual circumstances of this case, the unsupported statement is not acceptable as the sole determinative of the petitioner's ability to pay the proffered wage. According to the above cited regulation, copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.