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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: APR 0 6 2009

SRC 06 154 51040

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting 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 petitioner is a psychiatric center. It seeks to employ the beneficiary permanently in the United States as a nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. The petitioner failed to initially submit a Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 or labor certification) as required by statute. The director denied the petition as the petitioner failed to submit the required Form ETA 9089, comply with the Department of Labor (DOL)'s prevailing wage determination requirements, and submit a copy of the required posting notices.

The record shows that the appeal is properly filed, timely and makes a specific 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.

As set forth in the director's September 24, 2007 denial, the main issues in this case are whether or not the petitioner submitted the required Form ETA 9089, complied with the Department of Labor (DOL)'s prevailing wage determination requirements, and submitted a copy of the required posting notices.

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

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed 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 [United States Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d). Here, the priority date is April 18, 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 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. As the petitioner filed this matter on April 18, 2006, it was required to submit the job offer on the Form ETA 9089.

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 proscribed in § 656.10(d).

The regulation at 20 C.F.R. § 656.15(b) requires an Application for Permanent Employment Certification form for Schedule A to include a prevailing wage determination in accordance with § 656.40 and § 656.41.

The regulation at 20 C.F.R. § 656.40(a) states:

> 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. Unless the employer chooses to appeal the SWA's prevailing wage determination under Sec. 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with an ETA application processing center and maintains the SWA PWD in its files. The determination shall be submitted to an ETA application processing center in the event it is requested in the course of an audit.

The regulation at 20 C.F.R. § 656.40(c) states:

> *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 applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.

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[1]. The relevant evidence in the record includes a Form ETA 9089; and a job posting notice.

In the instant case, the petitioner failed to submit a Form ETA 9089 at the time of filing. Instead, the petitioner submitted a Form ETA 9089 signed by the petitioner and the beneficiary on appeal which was dated April 11, 2006. The petitioner also initially failed to submit the required posting notices and only did so on appeal. The AAO notes that the record fails to include a prevailing wage determination with the petition from the state workforce agency (SWA) with jurisdiction over the area of intended employment. The AAO thus finds that the petitioner has not complied with the regulation at 20 C.F.R. § 656.15(b) which requires an Application for Permanent Employment Certification form for Schedule A to include a prevailing wage determination in accordance with § 656.40 and § 656.41.

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

> In applications filed under §§ 656.15 (Schedule A), 656.16 (Sheepherders), . . . 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 . . . .
>
> **(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 were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

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[1] 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).

The AAO notes that the petitioner failed to demonstrate that it published notice of filing the application for permanent employment certification in any and all its in-house media in accordance with the normal procedures used for the recruitment of similar positions in its organization, an additional requirement set forth at 20 C.F.R. § 656.10(d)(1)(ii). Although the posting states that it is being published 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 posting fails to document any means of in-house notice or provide an explanation of any lack of in-house notice. Nothing in the record indicates that the petitioner published notice of filing the application for permanent employment certification in any and all of its in-house media in accordance with the normal procedures used for the recruitment of registered nurses in the petitioner's organization, as required by the regulation at 20 C.F.R. § 656.10(d)(1)(ii). Thus, the AAO finds that the petitioner had failed to provide evidence that it published notice of filing the application using its in-house media in accordance with the procedures used to notify its employees of job opportunities similar to that which is the subject of the application.

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;
>
> 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.

According to the regulation at 20 C.F.R. § 656.10(d)(6):

> If an application is filed under the Schedule A procedures at Sec. 656.15, or the procedures for sheepherders at Sec. 656.16, the notice must contain a description of the job and rate of pay, and must meet the requirements of this section.

In this case, the record reflects that the petitioner posted a notice of the filing of the application for permanent employment certification for ten (10) consecutive business days and that this notice was dated as being posted from April 24, 2006 to May 8, 2006. However, the posting notice that the petitioner submitted on appeal was dated after the date that the petitioner filed the Form I-140 on April 18, 2006. Accordingly, the posting does not comply with 20 C.F.R. § **656.10(ii)(3)(iv)** as it was not completed 30 to 180 days prior to the application. Additionally, the wage listed on the

posting notice must comply with 20 C.F.R. § 656.40. As the petitioner failed to submit a PWD, it is unclear whether the petitioner listed the proper wage on the posting notice.

Beyond the director's decision, the AAO notes that the petition was not accompanied by acceptable evidence of the petitioner's 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 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 April 18, 2006. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA form 9089 is $55,411.00 annually.

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 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, USCIS 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 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 in 2006 onwards.

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, USCIS 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).

The record before the director closed on April 18, 2006 with the receipt by the acting director of the Form I-140 and supplemental documents. As of that date, the petitioner's 2006 and 2007 federal income tax returns were not yet due. However, the AAO notes that the record fails to include other documentation in accordance with 8 C.F.R. § 204.5(g)(2) for the petitioner to show its ability to pay the proffered wage. As such, the AAO finds that the petitioner has not complied with the regulation at 8 C.F.R. § 204.5(g)(2).

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.