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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 08 225 50937 Office: NEBRASKA SERVICE CENTER Date: FEB 25 2010

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.

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), certified the denial of the immigrant visa petition to the Administrative Appeals Office (AAO). The director's decision to deny the petition will be affirmed.

The petitioner is a health care personnel contractor. It seeks to permanently employ the beneficiary in the United States as a registered nurse. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1]

The petition contains a blanket labor certification application 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 U.S. 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 must file a Form I-140, Immigrant Petition for Alien Worker accompanied by an application for Schedule A designation. The priority date of the petition is the date the petition is properly filed with U.S. Citizenship and Immigration Services (USCIS). 8 C.F.R. § 204.5(d).

The Schedule A application must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer's completion of an ETA Form 9089, Application for Permanent Employment Certification, and evidence that the employer has provided appropriate notice of filing the labor certification (Posting) to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d). The petitioner must also obtain a prevailing wage determination (PWD) in compliance with 20 C.F.R. § 656.40. Also, according to 20 C.F.R. § 656.15(c)(2), aliens who will be permanently employed as professional nurses must 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).

The instant petition was filed with USCIS on August 8, 2008. The petition states that the weekly wage to be paid to the beneficiary is $1,170.00 to $1,300.00 per week ($29.25 to $32.50 per hour). The ETA Form 9089 states that the prevailing wage is $31.26 per hour and the offered wage is $32.50 per hour. The petition was accompanied by a PWD from the State of California Employment Development Department (EDD), valid from February 21, 2008 until July 1, 2008. The prevailing

[1]Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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, 8 U.S.C. § 1153(b)(3)(A)(ii), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

wage listed on the PWD is $31.26 per hour. The petitioner also submitted a Posting, which indicates that it was posted from March 4, 2008 to March 18, 2008. The Posting states that rate of pay for the proffered position is $31.26 per hour.

On March 4, 2009 the director issued a request for evidence (RFE), instructing the petitioner to submit a PWD that was valid on the August 8, 2008 petition filing date. On April 3, 2009, the petitioner submitted a second PWD, valid from July 7, 2008 to July 1, 2009. The second PWD contains a prevailing wage of $32.65 per hour, which is higher than the rate of pay listed on the Posting, the offered wage listed on the petition, and the prevailing wage and the offered wage listed on the ETA Form 9089.

On May 18, 2009, the director issued a notice of intent to deny (NOID) the petition because the higher prevailing wage on the second PWD exceeded the rate of pay stated on the Posting. The NOID states that, by stating a lower rate of pay than the second PWD, the Posting failed to satisfy the requirements of the applicable regulations.

On June 16, 2009, the petitioner submitted a response to the NOID.[2] The response states that the petitioner attempted to obtain a new PWD on June 4, 2008, however, the request was denied by the California EDD as a duplicate request.[3] A copy of the rejected request for a PWD was included with the NOID response. The rejected PWD request contains the following notation from the California EDD: "[i]t is our understanding from the Department of Labor that an application for labor certification may be filed after a wage determination has expired, so long as recruitment was begun during the validity period of the determination." The petitioner claimed that it was following the instructions of the California EDD in submitting the original PWD with the petition. In addition, based on this statement, the petitioner claims that, since the original PWD was valid during the period that the Posting was posted, the original PWD was valid at the time the petition was filed, and the petition should therefore be approved. In making this argument, the petitioner asserts that the Posting is a form of recruitment for the offered position.

On October 22, 2009, the director concluded that the Posting submitted with the petition did not meet the applicable regulatory requirements, and certified the petition to the AAO for a final decision.[4]

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[2]The response is dated April 2, 2009, which appears to be a typographical error, as that predates the issuance of the NOID.

[3]It is noted that the California EDD issued a new PWD approximately one month later, and this second PWD was submitted with the RFE response.

[4]Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1). The regulation at 8 C.F.R. § 103.4(a)(4) states: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows:

In order for the petition to be approved, the petitioner must submit a PWD that complies with the requirements of 20 C.F.R. § 656.40. *See also* 20 C.F.R. § 656.15(b)(1). The regulation at 20 C.F.R. § 656.40(c) states that a Schedule A application must be filed within the validity period of the PWD. This is in contrast to the PERM labor certifications, which only requires the PWD to be valid during the recruitment period for the offered position. *Id.* However, since Schedule A occupations are designated by the DOL as shortage occupations, no recruitment is conducted as part of the Schedule A application process. As is correctly pointed out by the director, the Posting requirement is not a recruitment step. In the overview of its PERM regulation, the DOL states that the primary purpose of the Posting requirement is "to provide a way for interested parties to submit documentary evidence bearing on the application for certification rather than to provide another way to recruit for U.S. workers." 69 Fed. Reg. 77326, 77338 (Dec. 27, 2004).

Therefore, for Schedule A applications, the PWD must be valid when the petition and accompanying ETA Form 9089 are filed with USCIS. In the instant case, the original PWD submitted with the petition had expired when the petition was filed.

"*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states:

> (iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;
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> . . .
>
> (B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations.

In the instant case, the decision does not fall within the exception clause in subparagraph (B) in the regulation quoted above, which pertains only to a denial based upon a lack of a certification by the Secretary of Labor. The decision therefore is within the appellate jurisdiction of the AAO. Therefore, the certification of the denial decision is authorized by the regulation at 8 C.F.R. § 103.4(a)(5).

It appears that the California EDD incorrectly assumed that the petitioner's June 4, 2008 PWD request related to a PERM labor certification application instead of a Schedule A application. Accordingly, in rejecting the PWD request, the California EDD advised the petitioner that the original expired PWD was still valid for a labor certification application as long as recruitment was initiated during the validity period of the PWD. Although this is a correct summary of the regulations for a PERM labor certification, the instant case involves a Schedule A application, not a PERM labor certification. The California's EDD's statement pertaining to PWDs used in the PERM labor certification process does not change the petitioner's obligation to comply with the regulatory requirements for PWDs obtained for Schedule A applications.

Although the second PWD, which the petitioner submitted in response to the RFE, was valid on the petition filing date, it contains a prevailing wage that exceeds the rate of pay on the Posting, the offered wage on the petition, and the prevailing wage and offered wage on the ETA Form 9089. The Posting for a Schedule A application must state the offered rate of pay, and the offered wage must meet or exceed the prevailing wage. 20 C.F.R. § 656.10(d). On ETA Form 9089, the sponsoring employer must attest under penalty of perjury that the offered wage meets or exceeds the prevailing wage. 20 C.F.R. § 656.10(c). Further, USCIS will not approve an immigrant petition filed pursuant to Section 203(b)(3) of the Act is the offered wage does not meet or exceed the prevailing wage. Therefore, the petition cannot be approved using the second PWD submitted by the petitioner.

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 USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

For the reasons set forth above, the petitioner failed to submit a PWD that would permit an approval of the instant petition and accompanying Schedule A application.

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.

ORDER: The director's decision in the notice of certification is affirmed. The petition is denied.