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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 31 2010

SRC 08 092 53072

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:

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

The petitioner operates a nursing home, 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 Immigration and Nationality Act (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).

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 [U.S. Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d). Here, the petitioner filed its I-140 petition on January 25, 2008.

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

[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).

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(c)(2), 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 (3) that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

On March 18, 2008, the director denied the petition because the petitioner failed to submit a prevailing wage determination from the State Workforce Agency in accordance with 20 C.F.R. § 656.40(c). The director also noted that the petitioner failed to submit a signed ETA Form 9089. The AAO will address several additional bases for denial below.

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.[2]

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.

With respect to the issue of the prevailing wage, 20 C.F.R. §656.40 provides:

> (a) 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.
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> * * *
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> (c) 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 Sec. 656.17(d) or 656.21 within the validity period specified by the SWA.

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[2] 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 petitioner failed to file the petition with a valid prevailing wage determination or to submit a valid prevailing wage determination in response to the director's RFE.

On appeal, the petitioner submitted a prevailing wage determination dated March 26, 2008. The prevailing wage determination specified the validity period of the wage as between March 26, 2008 and June 30, 2008. However, as noted above, the petitioner filed its Form I-140 on January 25, 2008, i.e. two months before the prevailing wage determination was obtained or before its validity period began. On appeal, the petitioner admits that it did not file its Form I-140 during the validity period and states that it misunderstood the filing requirements. 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. 1998).

The director's RFE requested evidence that the petitioner posted notice in compliance with the terms of 20 C.F.R. § 656.10(d). The director states in his decision that the petitioner submitted evidence of posting. We disagree that any of the advertisements submitted would satisfy the requirements of 20 C.F.R. § 656.10(d) and the petition should have been denied on this basis as well. *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 did submit evidence of its recruitment including job position advertisements placed on job recruitment websites and letters confirming job advertisement placements. None of the advertisements could be considered notice in compliance with 20 C.F.R. § 656.10(d). The petitioner submitted faxes from the Middletown Press Classified Advertising section stating that advertisements would be placed between January 6 and January 13, 2008 and on February 6, 2008. The petitioner also submitted a fax from the petitioner to *Record Journal* for an advertisement to be placed between February 10 and February 17, 2008. This advertisement was for "R.N. Supervisor (M-F) 3-11 pm/C.N.A. positions." This advertisement did not specify the wage to be paid or the education or experience requirements for the position. The petitioner submitted a copy of advertisements posted on the Connecticut jobs website, however, these advertisements were for a Certified Nursing Assistant with a wage of $11.50 per hour with no education or experience required and for a Registered Nursing Supervisor with no minimum education specified and one year experience required at a wage rate of $35 per hour. The petitioner submitted faxes sent on January 4, 2008 and February 6, 2008 to the U.S. Department of Veteran Affairs, the Worker Compensation Commission, and the Bureau of Rehabilitation Services containing the advertisement placed with *Record Journal* and a list of qualifications for the position of Certified Nursing Assistant. The petitioner submitted a copy of a fax cover sheet to the three above listed organizations dated with no attachments. The petitioner submitted a job advertisement for a Certified Nursing Assistant placed on careerbuilder.com with an hourly wage of $11.50-$12.50, one year experience required. We note that a number of these advertisements were placed after the date that Form I-140 was filed and that none of the advertisements contained the correct job title or the correct hourly wage. None would meet the notice form of 20 C.F.R. § 656.10(d).

20 C.F.R. § 656.5 provides:

> We have determined there are not sufficient United States workers who are able, willing, qualified, and available for the occupations listed below on Schedule A and the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. An employer seeking a labor certification for an occupation listed on Schedule A may apply for that labor certification under Sec. 656.15.

Schedule A positions are pre-certified by DOL and therefore do not require the petitioner to complete any recruitment but instead must compete a notice of posting in compliance with 20 C.F.R. § 656.10(d). As no recruitment is required for Schedule A registered nurse petitions, the petitioner must file its application within the prevailing wage determination's validity dates pursuant to 20 C.F.R. § 656.40. Here, the petitioner obtained the prevailing wage determination after filing the application. Therefore, the petitioner failed to obtain and file the I-140 petition with a valid prevailing wage determination.

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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> . . .
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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 . . . 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.
>
> . . .

> (3) The notice of the filing of an Application for Permanent Employment Certification shall:
>
> (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;
> (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.
>
> . . .
>
> (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).

The petitioner submitted for the first time on appeal a copy of a job advertisement titled "3-11 RN Supervisor" that it states was posted on October 29, 2007. The notice would not meet the posting notice requirement or any in-house posting requirement as it is deficient by not stating the wage

offered, where it was posted, that it was posted for the required ten consecutive business days,[3] or that it was posted pursuant to a labor certification application. Additionally, it failed to advise applicants of the job requirements and failed to advise those with information about the application to notify the certifying officer with the DOL and failed to provide the address of the appropriate certifying officer.[4] *See* 20 C.F.R. § 656.10(d)(1)(6).

In addition to failing to provide required evidence about the posting notice, the petitioner submitted no evidence that the petitioner published the job opportunity in its in-house media as required by 20 C.F.R. § 656.10(d)(1)(ii).

In addition to the petitioner's failure to post the notice or obtain a prevailing wage determination as required, no evidence appears in the record that the beneficiary obtained the requisite experience prior to the filing of the Form I-140 or that the petitioner has the 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*, 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 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 regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a skilled worker that:

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[3] The Department of Labor's frequently asked questions section provides:

> **4. For how long must the employer publish a notice of filing in the employer's in-house media?**
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> If the employer normally recruits for similar positions in the employer's organization through in-house media, then the employer must publish the notice of filing in its in-house media in accordance with the employer's normal procedures for recruitment of similar positions or for 10 consecutive business days, whichever is of longer duration.

http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#notefile4 (accessed March 30, 2010).

[4] At the time of posting, for an offer in Connecticut, the petitioner should have listed the Atlanta National Processing Center at 233 Peachtree Street, N.E., Suite 400. *See* FAQ Round 1 at http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_3-3-05.pdf (accessed October 9, 2009); *see also 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).

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received.
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> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The regulations for the skilled worker classification contain a minimum requirement that the position require at least two years training or experience. The Form ETA 750 submitted with the Form I-140 states that an associate's degree is required, two years of clinical training is required, and one year of experience as a nurse. The petitioner submitted no evidence that the beneficiary has ever worked as a nurse or that she had clinical training. As a result, we are unable to conclude that the beneficiary had the requisite training and experience in the job offered at the time that this petition was filed. We also note that the ETA Form 9089 submitted on appeal states that no training or experience is required for the position. "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988); *Matter of Izummi*, 22 I&N Dec. 169, (Assoc. Comm'r, Examinations 1998).

The petitioner also submitted no evidence of 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. 8 C.F.R. § 204.5(g)(2) provides: "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 establish the prospective employer's ability to pay the proffered wage."

The petitioner must establish that its job offer to the beneficiary is a realistic one. In Schedule A cases, the filing of an I-140 establishes a priority date for the immigrant petition; 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, United States Citizenship and Immigration Services (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).

Here, the ETA Form 9089 was submitted with the appeal; the Form I-140 was submitted on January 25, 2008. The proffered wage stated on ETA Form 9089 is $25.15 per hour. On the Form I-140, the petitioner stated that it employs 180 workers. The petitioner submitted no statement from the financial officer of the organization or any other evidence in compliance with 8 C.F.R. § 204.5(g)(2) concerning its finances to show that it was capable of paying the proffered wage.

The petitioner failed to file the petition with a valid prevailing wage determination in accordance with 20 C.F.R. § 656.40(c). Additionally, the petitioner failed to establish that it published the notice of employment as set forth in 20 C.F.R. § 656.10(d)(1). Also, the petitioner did not submit evidence of the beneficiary's qualifications for the position as enumerated on the Form ETA 750 or evidence of its ability to pay the proffered wage. Accordingly, the petition may not be approved.

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