U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

DATE: DEC 2 6 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: [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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 is an acute care hospital. 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).

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).

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 United States 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 [United States Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d). Here, the petitioner filed the Form I-140 on July 25, 2007. The petitioner stated an hourly wage rate of $29.62 on ETA Form 9089.

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

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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).

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. § 656.5(a)(2), aliens who will be permanently employed as professional nurses must (1) have received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS), (2) hold a permanent, full and unrestricted license to practice professional nursing in the state of intended employment, or (3) have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing.

The director denied the petition because the petitioner failed to submit a valid prevailing wage determination (PWD) in accordance with 20 C.F.R. § 656.40.

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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 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'r 1988).

In the instant case, the petitioner failed to obtain a PWD in compliance with 20 C.F.R. § 656.40 from the relevant State Workforce Agency (SWA) prior to filing. The regulation at 20 C.F.R. § 656.40 specifically sets forth that the petitioner must request a wage and the wage obtained is assigned a validity period. In order to use a PWD, "employers must file their [Schedule A] applications or begin the recruitment required by §§ 656.17(e) or 656.21 within the validity period specified by the SWA." *See* 20 C.F.R. § 656.40(c). The petitioner must file ETA Form 9089 and Form I-140 with the prevailing wage determination issued by the SWA having jurisdiction over the proposed area of employment. *See* 20 C.F.R. § 656.15(b)(i). A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

In the instant case, the petitioner submits a PWD from the California Employment Development Department (EDD). The PWD was determined on February 1, 2007, prior to the petitioner's July 25, 2007 filing of the petition, and the PWD indicates that this prevailing wage is valid for filing applications and attestations until June 30, 2007. The record shows that the instant Schedule A

[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 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

application was filed on July 25, 2007. The PERM regulations expressly state that an employer must file its application within the validity period specified by the SWA. In the instant case, the petitioner filed its application after the expiration date listed on the PWD and thus, did not file its Schedule A application within the validity period specified by the EDD. Therefore, the petitioner failed to comply with the regulatory requirements with respect to the PWD validity period.

The petitioner does not dispute that the PWD was expired at the time the petition was filed on July 25, 2007. Rather, on appeal, counsel asserts that 20 C.F.R. § 656.40(c) allows a petition to be filed with an expired prevailing wage determination if the recruitment in connection with the petition was completed during the validity period of the prevailing wage determination. This assertion is incorrect. As the offered position of Registered Nurse is on the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the 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, no recruitment is required for these positions. Therefore, with respect to Schedule A filings, 20 C.F.R. § 656.40(c) requires that the prevailing wage determination be valid at the time that the petition is filed.

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.
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> . . .

(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.

The requirement of 20 C.F.R. § 656.10(d) to post the position for Schedule A eligibility is not a form of recruitment. Rather, the posting is required to give notice of the filing of the Application for Permanent Employment Certification. As stated above, the DOL has already determined that there are not sufficient United States workers who are able, willing, qualified and available for the position, and no recruitment is required.

On appeal, counsel submits another PWD. The PWD submitted on appeal was issued by the EDD on July 24, 2007 and is valid through March 1, 2008. Counsel asserts that this PWD was valid at the time the instant petition was filed, on July 25, 2007, and therefore cures any defect in the initially submitted PWD. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director in his December 15, 2008 request for evidence (RFE), the petitioner declined to provide a PWD valid at the time the petition was filed. The petitioner's failure to submit this document cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Even if the AAO were to accept the PWD submitted on appeal, the PWD is still deficient. The PWD issued on July 24, 2007 shows a prevailing wage rate of $30.21 per hour. The proffered wage of $29.62 per hour listed on ETA Form 9089 is below the prevailing wage rate of $30.21 per hour. Therefore, the offered wage does not equal or exceed the prevailing wage determined pursuant to 20 C.F.R. § 656.40 and § 656.41.

The petitioner submitted an additional PWD issued by the EDD on July 27, 2007, which was valid through January 1, 2008. The PWD shows a prevailing wage rate of $29.62 per hour, which is the same wage rate listed on the ETA Form 9089. As the petitioner filed the petition on July 25, 2007, this PWD was not yet in effect.

Beyond the decision of the director,[3] the AAO finds that the petition lacks evidence that the notice of job opportunity was posted in the petitioner's in-house media in accordance with the provisions found at 20 C.F.R. § 656.10(d).

The regulation at 20 C.F.R. § 656.10(d) provides:

> (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 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 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.*

(emphasis added).

20 C.F.R. § 656.10(d) does not define "in-house media" or what sources in-house media would comprise. The initial PERM regulation published at 69 Fed. Reg. 77326 provides only that the posting must be "published in any and all in-house media in accordance with the normal procedures used for the recruitment of other similar positions." 69 Fed. Reg. at 77338.

DOL's FAQ response "Round 10" provides that "the regulations require that the employer publish the notice internally using in-house media – whether electronic or print – in accordance with the normal internal procedures used by the employer to notify its employees of employment

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[3] 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

opportunities in the occupation in question." *See* http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (accessed November 23, 2012). The FAQ response further provides that:

> The language should give sufficient notice to interested persons of the employer's having filed an application for permanent alien labor certification . . . it is not required to mirror, word for word, the physical posting... . In every case, the Notice of Filing that is posted to the employer's in-house media must state the rate of pay and apprise the reader that any person may provide documentary evidence bearing on the application to the Certifying Officer.

DOL's FAQ response notes that the posting contemplates internal notification of the petitioner's employees rather than external notification to the public at large. Further, the posting requirement relates to the employer's "*normal procedures used for the recruitment of similar positions in the employer's organization.*"

In the instant case, the petition was filed without evidence that the bargaining unit was given notice of the instant petition. The director issued a RFE on December 15, 2008, directing the petitioner to provide a copy of the letter or notice that was provided to the bargaining representative, and a signed and dated attestation from the bargaining representative attesting to the receipt of the notice. In response, the petitioner provided a copy of the posting notice, and a cover letter that states it is the employer's "policy... to make available job postings or vacancies for Registered Nurses to the union." The petitioner's response does not meet its burden of establishing that the bargaining representative was given notice in this case. The petitioner did not even assert that it had given actual notice in this case to the bargaining representative.

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.