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U.S. Citizenship and Immigration Services

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[redacted]

DATE: JAN 05 2012 OFFICE: VERMONT SERVICE CENTER FILE: [redacted]

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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,
Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director, Vermont Service Center, 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 a healthcare personnel and service provider, 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 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii). For the beneficiary to qualify, the petitioner must show that it has the ability to pay the beneficiary the proffered wage, and that the beneficiary meets the qualifications set forth in the certified labor certification.

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.10 with respect to which the Director of the United States Employment Service 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) an applicant for a Schedule A position would file a 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." 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).

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 to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.20(g)(3). 20 C.F.R. § 656.22(a) and (b). Also, according to 20 C.F.R. § 656.10, 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 that the alien has passed the

National Council Licensure Examination for Registered Nurses (NCLEX-RN). Additionally, the petitioner must demonstrate its ability to pay the proffered wage. This will be discussed below.

Here, the petitioner submitted the Application for Alien Employment Certification, Form ETA-750, with the Form I-140 Immigrant Petition on December 29, 2004, which is the priority date. The proffered wage as stated on Form ETA 750A for the position of a nurse is $23.50 per hour, 40 hours per week, which equates to an annual salary of $48,880.

The director issued a notice of intent to deny on February 23, 2005, requesting that the petitioner submit: evidence that the petitioner provided notice to the bargaining representative or posted notice at the location of employment for at least 10 consecutive days on or before the date of the petitioner's response to this notice; fully executed Forms ETA 750 A&B in duplicate; evidence of the petitioner's ability to pay the proffered wage from December 29, 2004; evidence that the beneficiary met the ETA 750 educational and training requirements; and evidence that the beneficiary passed the CGFNS, or NCLEX-RN exam. The petitioner timely responded on March 23, 2005, submitting a copy of the job notice that was posted, a copy of the Form ETA 750, a copy of the interim permit issued by the Board of Registered Nursing of the State of California, and a copy of the company's financial statement issued by the Financial Officer.

The director denied the petition on May 16, 2005 on the basis that the petitioner submitted a copy that the notice had been posted, but did not mention the location of the posting, which was not in accordance with in accordance with 20 CFR § 656.20(g)(1)(ii). Further, the director found that the petitioner did not submit a fully executed Form ETA 750 because it indicated "N/A" where the beneficiary would work. In addition, the petitioner submitted an "interim permit" for the beneficiary to practice professional nursing in the state of California, which expired on April 27, 2004. The petitioner appealed and the matter is now before the AAO.

The AAO reviews *de novo* 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 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.

[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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner is required to post the position in accordance with 20 C.F.R. § 656.20(g)(ii), which provides:

> "(1) in applications filed under Sec. 656.22 (Schedule A) . . . the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:
> . . .
>
> (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 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."
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> . . .
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> (3) Any notice of the filing of an Application for Permanent Employment Certification shall:
> (i) State that applicants should report to the employer, not to the local Employment Service office;
> (ii) State that the notice is being provided as a result of the filing of an application for permanent alien certification for the relevant job opportunity; and
> (iii) State any person may provide documentary evidence bearing on the application to the local Employment Service and/or the regional Certifying Officer of the Department of Labor
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> . . .
>
> (8) If an application is filed under the Schedule A procedures at Sec. 656.22, . . . the notice shall contain a description of the job and rate of pay, and the requirements of paragraphs (g)(3)(ii) and (iii) of this section.
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> *See also* § 212 (a)(5)(A)(i) 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.

In the present case, the petitioner initially filed its Form I-140 petition on December 29, 2004. The petitioner submitted a copy of the posting notice in response to the Notice of Intent to Deny. The notice was posted subsequent to the filing of the petition from February 28, 2005 to March 18, 2005. However, the petitioner did not submit any proof that the posting was in compliance with 20 C.F.R. § 656.20(g)(ii), requiring it to be posted with access by the employer's employees at the facility or location of the employment. The petitioner does not provide an explanation as to why she did not do that. Further, the notice was posted subsequent to filing the petition, and thus would not allow any effected parties or parties with information bearing on the application to notify the DOL prior to the petitioner filing the application, and accordingly could adversely impact U.S. workers. *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 statute clearly requires that notice of filing a Schedule A application be posted prior to filing the Form I-140 petition and labor certification forms with CIS.[2]

In addition, 20 C.F.R. §656.22(c)(2) states in pertinent part that:

> An employer seeking a Schedule A labor certification as a professional nurse (§ 656.10(a)(2) of this part) shall file, as part of its labor certification application, documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment.

In the present case, the petitioner has not submitted the beneficiary's permanent license to practice nursing in the state of intended employment. The petitioner submitted an *interim* permit, which expired on April 27, 2004, from California.[3] As noted by the director, the petitioner has not listed the state of intended employment on the Form ETA 750A. Thus, the petitioner cannot comply with the regulation requiring that, "the alien holds a full and unrestricted (permanent) license to practice nursing

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[2] A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

[3] The AAO notes that nowhere in the record does the beneficiary have any ties to California. Her address on this interim permit is in New Rochelle, New York.

in the state of intended employment." As the permit is neither permanent nor from the state of intended employment, the petition must be denied.

On appeal, the petitioner stated that "said interim permit issued by the Board of Nursing of the State of California can only be extended when [redacted] is given a valid legal working status and issued a social security number." This explanation does not overcome the regulatory requirements.

Accordingly, the petitioner has failed to meet the regulatory requirements for posting notice of the job opportunity, and has failed to establish that the beneficiary is qualified to perform the services of a registered nurse as of the priority date.

Beyond the directors' decision, the AAO also finds that the petitioner lacks the ability to pay the proffered wage to the beneficiary. 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).

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

In the present case, the petitioner did not submit any IRS Forms which demonstrate that it has the ability to pay the beneficiary the proffered wage. The petitioner submitted an "independent auditor's report" from [redacted], a certified public accountant, dated March 15, 2005. The AAO notes that [redacted] is not a certified public accountant in the state of New Jersey. (*See* https://newjersey.mylicense.com /verification/Search.aspx?facility=N, accessed November 23, 2011) Further investigation makes the AAO question the identity of [redacted].[4] *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

[4] The address that [redacted] listed in his letterhead, "[redacted]" is the same address that the beneficiary listed on the Form ETA 750. Further, the telephone number listed by [redacted] in his letterhead is the cell phone number of [redacted]. The AAO notes that [redacted] is the uncle of the representative for the petitioner, [redacted].

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

In addition, the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140) for 26 more workers with priority dates ranging from February 10, 2003 to January 26, 2007. Therefore, 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 (Acting Reg'l Comm'r 1977) (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 ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). The petitioner has not proved that it can pay the wage of the current beneficiary or of the 26 other beneficiaries for whom it has filed immigrant visa petitions.

As the only evidence submitted to establish the ability to pay is [redacted] auditor's report of 2004, the petitioner has failed to establish the ability to pay. Because it is doubtful that [redacted] independent auditor's report is authentic, the AAO cannot consider it. Further investigations indicate that the petitioner has gone through Chapter 7 bankruptcy in New Jersey. The AAO concludes that the petitioner does not have the ability to pay the beneficiary the proffered wage. For this additional reason, 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. 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.