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

(b)(6)

Date: FEB 2 1 2013 Office: NEBRASKA SERVICE CENTER File:

IN RE: Petitioner:

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:

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be withdrawn in part and affirmed in part, and the petition will be denied.

The petitioner is a rehabilitation hospital. It seeks to employ the beneficiary permanently in the United States as a registered nurse, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. The petitioner 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. The director determined that the petitioner failed to properly post the position in accordance with 20 C.F.R. § 656.10(d)(1). Specifically, the director found that the petitioner failed to include the proper proffered wage on the notice, failed to attest to where the notice was posted, and failed to post the notice in in-house media. The director also noted the petitioner's failure to produce evidence of its ability to pay the proffered wage from the date the labor certification was accepted onward. The director denied the petition accordingly.

On January 21, 2010, the AAO dismissed the subsequent appeal, affirming the director's denial; the AAO found beyond the decision of the director that the petitioner failed to demonstrate that the beneficiary had the required education at the time that the Form I-140 was filed. The petitioner filed a motion to reopen and reconsider the AAO decision. The record shows that the motion is properly filed and timely and provides information concerning assets acquired by the petitioner. The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or United States Citizenship and Immigration Services (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, we will accept the motions to reopen and reconsider the matter based on the new information submitted. The instant motions are granted. 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.

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).

As stated in the previous AAO decision, 20 C.F.R. § 656.10(d) 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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> (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment. Documentation may consist of a copy of the letter and a copy of the Application for Permanent Employment Certification form that was sent to the bargaining representative.
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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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> . . .
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> (3) The notice of the filing of an Application for Permanent Employment Certification must:
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> (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;
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> (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
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> (iii) Provide the address of the appropriate Certifying Officer; and (iv) Be provided between 30 and 180 days before filing the application.
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> . . .
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> (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.

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.

The record contains a prevailing wage determination (PWD) dated June 23, 2006 listing an houly pay rate of $23.40.[1] The Form ETA 9089 lists the offered wage as $23.00 to $25.00 with the pay range starting below the prevailing wage. The petitioner initially submitted a posting notice that stated an hourly wage of $23.00 per hour instead of the required proffered wage of $23.40 per hour. The director and the AAO's previous decision cited the petitioner's failure to comply with 20 C.F.R. § 656(d)(10) in the decisions. On motion, the petitioner submitted a PWD dated July 2, 2007 for July 2007 through June 2008 stating the prevailing hourly wage for level 1 nurses was $24.31. As the Form I-140 was filed July 3, 2006, this updated PWD would not apply to the current petition. 20 C.F.R. § 656.10(d)(6) requires that the posing notice contain the correct rate of pay to ensure that potential U.S. workers are apprised as to the position in its entirety. The notice posted was insufficient to provide notice as to the wage available for this particular position, which according to the PWD would have had to be $23.40 per hour regardless as to the amount that the petitioner was actually paying the beneficiary. The previous AAO decision held that the posting provided does not specify the correct prevailing wage and therefore is not in compliance with 20 C.F.R. § 656.10(d)(6) thus making the petition unapprovable. The petitioner submitted no evidence with its motions to lead to a different conclusion. As a result, this part of the AAO's decision is affirmed.

In addition to not providing the proper prevailing wage on the notice, the director and the previous AAO decision noted that the petitioner failed to state where the notice was posted or to publish the notice in any in-house media as required by 20 C.F.R. § 656.10(d)(1)(ii). With its motions, the petitioner submitted other recruitment postings dated January, April, and August 2006; October 2007; April and May 2008; February 2010. None of the advertisements list a rate of pay or state where they were posted or displayed. The petitioner submitted a letter from its director of human resources, dated April 13, 2010 stating that the posting was placed at the petitioner's location for the requisite ten consecutive business days and forty days before the petition was filed. As the job postings submitted did not state where they were posted nor did they include a rate of pay, we are unable to determine that they cured the notice deficiency stated in the previous AAO decision.

Furthermore, the evidence submitted says nothing about the notice having been provided in-house media as specifically required in the regulations at 20 C.F.R. § 656.10(d)(1)(ii). The letter submitted from Ms. submitted with the motions states that "the job was advertised in any and all in-house media in accordance with the normal procedures for the recruitment of

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[1] The AAO notes that the PWD contains a typo listing $23.40 as the annual prevailing wage.

similar positions." The advertisements, however, do not list a rate of pay and are, therefore, insufficient to demonstrate that the petitioner published the notice in in-house media as required by 20 C.F.R. § 656.10(d)(1)(ii). As a result, the petitioner has not fulfilled the requirements of 20 C.F.R. § 656.10(d)(1)(ii), and the AAO's decision affirming the director's decision to deny the petition is affirmed.

Concerning the petitioner's 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

As noted in the AAO's prior decision, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the date that the I-140 was filed, which in this case was July 3, 2006. The proffered wage as stated on the Prevailing Wage Determination generated by the Commonwealth of Massachusetts Division of Career Services is $23.40 per hour ($48,672 per year).

In the AAO's March 15, 2010 decision, the AAO specifically reviewed evidence of wages paid to the beneficiary in the form of wage statements covering January 6, 2007 to March 17, 2007. Those wage statements reflect that the petitioner paid the beneficiary a total of $13,571.75 gross wages over that period.[2] We noted the petitioner's net income as shown on the 2005 Form 1120[3] was in excess of $6.5 million and was therefore sufficient to establish the ability to pay the proffered wage from the July 3, 2006 priority date to the September 30, 2006 end of fiscal year.

With its motions, the petitioner submitted its 2006 Form 1120 stating net income in excess of $7.5 million, its 2007 Form 1120 stating net income in excess of $7 million, and its 2008 Form 1120 stating net income in excess of $8.8 million. This evidence is sufficient to demonstrate the petitioner's ability to pay the proffered wage. The portion of the director's and AAO's decisions concerning this issue is withdrawn.

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[2] The wage statement also indicates that the beneficiary was not working a set number of hours per week, but instead his biweekly hours ranged from 59.25 to 120 and three out of the six pay periods reflected hours worked at less than the 80 hours indicated on the petition. 20 C.F.R. § 656.3 states that "Employment means: (1) Permanent, full-time work by an employee for an employer other than oneself." The labor certification must be for full-time employment.

[3] The Form 1120 indicates that the petitioner's fiscal year runs from October 1 to September 30.

Concerning the beneficiary's qualifications for the position, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 26, 2004. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a skilled worker that:

> (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.

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).

The ETA Form 9089 specified that an Associate's degree is required for the position. With its motions, the petitioner submitted a copy of the beneficiary's December 2005 Associate degree in Nurse Education from [redacted] Massachusetts and the beneficiary's February 1, 2006 nursing license granted by the Commonwealth of Massachusetts. The petitioner previously submitted an April 13, 2006 Certificate from the International Commission on Healthcare Professions, a division of CGFNS verifying that the beneficiary is a registered nurse. This evidence is sufficient to demonstrate that the beneficiary had the qualifications for the position as of the July 3, 2006 priority date. As a result, that portion of the AAO's decision denying the petition on this ground is withdrawn.

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 motion to reopen is granted and the decision of the AAO dated March 15, 2010 is withdrawn in part and affirmed in part. The petition remains denied.