

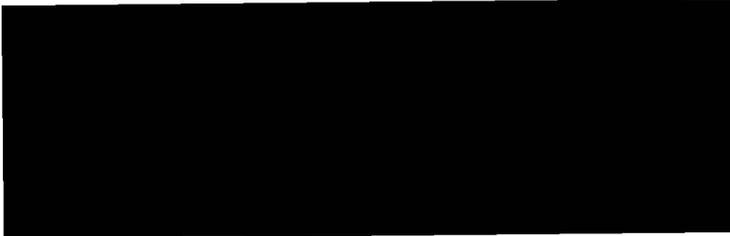


U.S. Citizenship
and Immigration
Services

**identifying data deleted ...
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

86

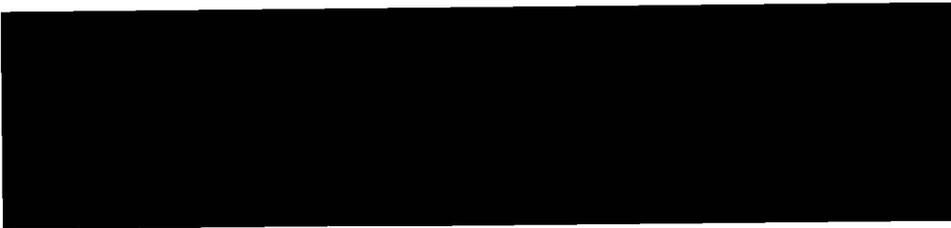


FILE: WAC-04-016-52427 Office: CALIFORNIA SERVICE CENTER Date: MAR 24 2006

IN RE: Petitioner: [Redacted]
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:



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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a health care service company. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. As required by statute, a Form ETA 750, Application for Alien Employment Certification accompanied the petition. The director determined that the petitioner failed to post the prevailing wage rate for the proffered position required by the Department of Labor (DOL) Employment Standards Administration, and thus failed to post the notice in compliance with 20 C.F.R. §§ 656.20(g)(1) and (g)(8). Therefore, the director denied the petition. The director also determined that the petitioner failed to submit evidence of the beneficiary's qualification for the proffered position.

On appeal, counsel argues in a brief that there is no requirement that an employer post or pay the prevailing wage for an I-140 filed under Schedule A, Group I.

Section 203(b)(3) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1153(b)(3), 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 or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. This section also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse on October 23, 2003. Aliens who will be permanently employed as professional nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.10 for 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. 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.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA-750 at Part A) in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. The Application for Alien Employment Certification shall include:

1. Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.
2. Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

The regulation at 20 C.F.R. § 656.20(g)(1) provides, in pertinent part,

In applications filed under § 656.21 (Basic Process), § 656.21a (Special Handling) and § 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:

(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.

(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 shall be posted for at least 10 consecutive days. The notice shall be clearly visible and unobstructed while posted and shall 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, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

With the petition, the petitioner submitted a complete Form ETA 750 in duplicate and a posting notice. Both the ETA 750 and the notice indicate that the rate of salary is \$23.00 per hour. However, the director found that the wage determined by DOL in Contra Costa County, the place of intended employment, is \$28.59 per hour, therefore, the petitioner failed to post the notice in compliance with regulations at 20 C.F.R. §§ 656.20(g)(1) and (g)(8). Counsel argues on appeal that there is no requirement that an employer post at or pay the prevailing wage for an I-140 filed under Schedule A, Group I and that CIS has no authority or expertise to determine prevailing wages and failed to provide any evidence as to the basis for their prevailing wage determination.

The regulations at 20 C.F.R. § 656.20 provide general filing instructions for various labor certification applications, including labor certification application for an occupation listed on Schedule A. 20 C.F.R. § 656.20(c) requires:

Job offers filed on behalf of aliens on the Application for Alien Employment Certification form must clearly show that:

- (1) The employer has enough funds available to pay the wage or salary offered the alien;
- (2) The wage offered equals or exceeds the prevailing wage determined pursuant to § 656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work;
- (3) The wage offered is not based on commissions, bonuses or other incentives, ... ;

The plain meaning of the language of the regulation expressly requires an employer who files any labor certification application, including a labor certification application for an occupation listed on Schedule A, to

pay the prevailing wage. Counsel's argument that there is no requirement that an employer post at or pay the prevailing wage for an I-140 filed under Schedule A, Group I is misplaced.

Counsel asserts that CIS has no authority or expertise to determine prevailing wages and failed to provide any evidence as to the basis for their prevailing wage determination. Counsel's assertion is misplaced. CIS has the authority to review the petitioner's proffered wage for compliance with the DOL prevailing wage rates. 20 C.F.R. § 656.22(e) reads in pertinent part:

An Immigration Officer shall determine whether the employer and alien have met the applicable requirements of § 656.20 of this part, of this section, and of Schedule A (§ 656.10 of this part); shall review the application, and shall determine whether or not the alien is qualified for and intends to pursue the Schedule A occupation.

See also 20 C.F.R. § 656.40(a)(1).

The prevailing wage is determined by DOL. DOL's website at www.ows.doleta.gov provides access to an Online Wage Library (OWL). OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically. The prevailing wage rates are then broken down into two skill levels. General Administration Letter (GAL) 2-98 (DOL) states "DOL Issues Guidance on Determining OES Wage Levels" and Training and Employment Guidance Letter (TEGL) No. 5-02 (DOL) provides guidance on appropriate skill level categorization. The occupation and corresponding job description in this case indicate that it is a Level 1 position because the proffered position of nurse will report to a supervisor and is an entry-level position not requiring any years of experience or training. OWL reports that for 2003, the year of the petition's priority date, the prevailing wage rate for a Level 1 registered nurse in Contra Costa County – Oakland, CA PMSA was \$28.59 per hour, or \$59,467 per year. The offered wage for the position is \$23.00 per hour, which is less than the proffered wage. While DOL regulations allow for the proffered wage to come within 95% of the proffered wage, the instant petition's proffered wage does not fall within that threshold. *See* 20 C.F.R. § 656.40(a)(2)(i). Thus, the petitioner is not offering the prevailing wage rate and the petition cannot be approved for this reason.

Therefore, counsel's assertion on appeal cannot overcome the director's decision that the petitioner failed to offer the prevailing wage and further failed to post the prevailing wage in compliance with regulatory requirements set forth at 20 C.F.R. §§ 656.20(g)(4), 656.21(g)(4), 656.21(i)(1)(i) and 656.22(b)(2). The director's decision shall stand, and the petition will be denied.

Next, the AAO will discuss the issue of whether the petitioner submitted proper evidence of the beneficiary's education. The director determined that the petitioner failed to submit evidence of the beneficiary's education because it failed to provide transcripts for either the beneficiary's Associates degree or the Bachelors degree. Counsel argues on appeal that the petitioner properly established that the beneficiary met the educational requirements for the proffered position with a credential evaluation.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification.¹ The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of registered nurse. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|-------------------------|-------------------|
| 14. | Education | |
| | Grade School | |
| | High School | |
| | College | 2* |
| | College Degree Required | Associates Degree |
| | Major Field of Study | Nursing |

Additionally, Item 15 Other Special Requirements states as follows: “*In alternative, two years prior experience as a Registered Nurse. Must be eligible to apply for California RN license.”

The beneficiary set forth her credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), she indicated that she attended Velez College in Cebu City, Philippines in the field of “Nursing” from June 1998 through March 2002, culminating in the receipt of a Bachelor of Science in Nursing degree. She provides no further information concerning her educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct. In corroboration of the Form ETA-750B, the petitioner provided copies of the beneficiary’s degree certificate for Bachelor of Science in Nursing issued by Velez College on March 19, 2002, and a credential evaluation drafted by [REDACTED] of Educated Choices LLC. The petitioner did not submit transcripts for the beneficiary’s degree studies either with the initial filing or appeal.

In the instant case, the ETA 750 requires two (2) years college studies and an associates degree in nursing. The petitioner must establish that the beneficiary had the requisite two years college studies and the associates degree or foreign equivalent degree prior to the filing. The beneficiary’s degree was granted by Velez College in Philippines on March 19, 2002, prior to the filing date, but it is not a U.S. degree. Furthermore, the degree certificate does not indicate how many years the beneficiary studied before the degree was awarded. Therefore, the petitioner also submitted the credential evaluation from [REDACTED] Mr. [REDACTED] Mr. [REDACTED] summarizes his findings as follows:

It is our opinion that [the beneficiary] has achieved the equivalent of a Bachelor’s Degree in Nursing as awarded by a regionally accredited U.S. college or university.

¹ CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

* * *

In order to complete [the evaluation] we requested and received photocopies of the original diploma. ... The material submitted was sufficient in both quantity and authenticity to allow for a thorough review, analysis and evaluation.

Specifically, upon the completion of a 4-year course of study at Velez College, Republic of the Philippines, [the beneficiary] was admitted to the degree of Bachelor of Science in Nursing in March of 2002.

The credential evaluation does not appear to be supported by a review of transcripts which show the number of courses and years the beneficiary studied. As previously mentioned, the degree itself does not indicate the number of years the beneficiary studied at that college in the degree program. However, Dr. [REDACTED] concluded that the beneficiary completed a 4-year course at Velez College, and therefore her degree is equivalent to a U.S. degree. The credential evaluation does not explain the documents it relied upon for the equivalency evaluation. CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

It was proper for the director to seek evidence to corroborate the petitioner's claim that the beneficiary completed a four year degree. The record of proceeding, however, contains evidence that GCFNS issued a certificate to the beneficiary on June 12, 2003, which precedes the priority date. According to 8 C.F.R. § 212.15(k)(7), GCFNS has been authorized by CIS to issue a certificate to an alien "after the education, experience, license, and English language competency have been evaluated and determined to be equivalent to their United States counterparts." Since the record of proceeding contains a GCFNS certificate issued to the beneficiary, the AAO finds that the beneficiary's education or experience is deemed equivalent to education or experience in the United States. Thus, the portion of the director's decision regarding the beneficiary's qualification is overturned.

Beyond the decision of the director, the petitioner has not established that it has the ability to pay the proffered wage as of the priority date and onward. 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*, 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).

In the instant petition, the petitioner has not established that it has the ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 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 establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the completed, signed petition, including all initial evidence and the correct fee, was filed with CIS. *See* 8 CFR § 204.5(d). Here, the petition was filed with CIS on October 23, 2003.

On the petition the petitioner claimed to currently employ more than 100 employees, however, the petitioner did not submit a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. The instant petition was filed by the petitioner with its own federal identification number from the Internal Revenue Service (IRS). The petitioner claimed that it is a subsidiary of [REDACTED]. The submitted list of subsidiaries of [REDACTED] includes the petitioner as one of the numerous subsidiaries. The petitioner did not submit any financial or tax documents for itself, but submitted some pages of [REDACTED] 10-K Annual Report for the year ending December 2002 pertinent to the petitioner's ability to pay the proffered wage. The petitioner did not document the relationship between the petitioner and [REDACTED] and did not explain the tax filing system within [REDACTED]. In addition, [REDACTED] 2002 10-K Annual Report does not and cannot provide any financial information to demonstrate the petitioner's ability to pay the proffered wage in 2003, the year of the priority date. Furthermore, CIS records show that the petitioner filed thirty (30) immigrant petitions for Schedule A, Group I in 2003 and 2004, and also that the parent company, [REDACTED] filed one hundred and ninety-two (192) immigrant petitions during the last two years. However, it is not clear how many immigrant petitions [REDACTED] and its subsidiaries have filed; [REDACTED] is responsible to demonstrate its ability to pay all the proffered wages until each of them obtains permanent residence. Therefore, the petitioner did not demonstrate its or its parent company's ability to pay all proffered wages to the multiple beneficiaries beginning on the priority date.

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.