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U.S. Citizenship
and Immigration
Services

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BE



FILE: [REDACTED]
WAC 06 021 50300

Office: TEXAS SERVICE CENTER

Date: DEC 03 2007

IN RE: Petitioner: [REDACTED]

Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b).

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, certified the instant preference visa petition to the Administrative Appeals Office (AAO) for review. The director did not make a decision on the petition before certifying it to this office. The petition will be denied.

The petitioner is a medical center. It seeks to employ the beneficiary permanently in the United States as a registered nurse (RN). The petitioner asserts that the beneficiary qualifies for Schedule A, Group I labor certification pursuant to 20 C.F.R. § 656.5(a). In support of the petition, the petitioner submitted both of the following: (1) a prevailing wage determination (PWD) from the state workforce agency (SWA) dated October 5, 2005 that indicates that the PWD was valid for slightly less than the minimum 90 days required for such determinations; and (2) a facsimile transmittal dated July 2, 2007 from the SWA that states that the SWA made an error when it indicated on the PWD form that the PWD was valid for less than 90 days, and that the correct validity period is 90 days from the date of the PWD. The director requested that this office provide guidance as to whether Citizenship and Immigration Services (CIS) may use information in the record other than that found on the SWA PWD form to determine the validity period of the PWD, even though the regulations at 20 C.F.R. §§ 656.40(a) and (c) indicate that the petitioner is obliged to have the SWA list such information on its PWD form.

The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

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 or seasonal nature, for which qualified workers are not available in the United States.

On October 25, 2005, the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as an RN. Aliens who will be permanently employed as registered nurses are identified on Schedule A as set forth at 20 C.F.R. § 656.5 as being aliens who hold occupations for which the Director of the U.S. Employment Service has determined there are not sufficient U.S. 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 U.S. workers who are similarly employed.

An employer shall apply for a labor certification for a Schedule A occupation by filing an ETA Form 9089, Application for Permanent Employment Certification, in duplicate with the appropriate CIS office. Pursuant to 20 C.F.R. § 656.15(b)(1), a Schedule A application shall include an "Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41."

The regulations at 20 C.F.R. § 656.40 state in relevant part:

- (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....

(b) Determinations. The SWA determines the prevailing wage as follows:

(1) Except as provided in paragraphs (e) and (f) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms-length between the union and the employer, the wage rate set forth in the CBA agreement is considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it is considered the “prevailing wage” for labor certification purposes. . . .

(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 application or begin the recruitment required by §§656.17(d) or 656.21 within the validity period specified by the SWA.

The AAO maintains plenary power to review each case on a *de novo* basis. 5 U.S.C. § 557(b) (“[T]he agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted in response to the certification of the petition to this office. Relevant new evidence submitted in response to the certification includes: (1) briefs dated October 20, 2007 and October 26, 2007 submitted by Yana Tkachenko, an attorney at the same firm as the attorney of record; and (2) two copies of a letter written by [REDACTED] of the Employment Development Department (EDD), State of California, dated October 22, 2007, on EDD letterhead, which indicate that the EDD, the SWA in this matter, listed an incorrect validity period on the PWD form submitted in support of the instant petition, and that the correct validity period for the PWD is 90 days from the PWD made on October 5, 2005.

First, this analysis will address whether the petitioner may use a facsimile transmittal note from a SWA or a letter from a SWA to substitute for and/or supplement a PWD form that does not, on its own, meet regulatory requirements, such as those set forth at 20 C.F.R. § 656.40(a) and (c), in violation of regulatory requirements that such information be listed correctly on the SWA PWD form itself. *See* 20 C.F.R. § 656.40(a) and (c). Regarding this issue, the AAO would emphasize that in these proceedings the burden is on the petitioner to establish that its request meets all requirements of the law for the relevant employment-based immigrant visa petition. Section 291 of the Act, 8 U.S.C. § 1361. *See also Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). In keeping with this, the AAO finds that it is the petitioner’s responsibility to review the PWD form when it is received from the SWA and before it submits the form and/or its related petition(s) to CIS in order to make certain that the form complies with all statutory and regulatory requirements.¹ CIS shall not use

¹ The office would also note that it contacted the EDD on November 26, 2007. Its representatives explained that, as a general rule, employers and their attorneys review PWD forms as soon as they receive them to make certain that they meet regulatory requirements, to make certain that they do not contain any errors, etc. When the PWD forms contain errors related to the validity period, when the EDD failed to complete some required boxes on the forms, etc., the employers or their attorneys telephone the EDD regarding the errors. The EDD then issues corrected PWD forms to the employer. The EDD apparently lists the date that such forms are corrected at the bottom of the corrected PWD form. The EDD issues such corrected PWD forms on a regular

information contained in letters or other correspondence from the SWA to correct error(s) on the required SWA form, where, because of the error(s), the form fails to meet regulatory requirements, and where the regulations indicate that the information in its proper, corrected form is to be listed on the SWA form itself.

As the SWA PWD form submitted with the instant petition does not meet regulatory requirements in that its prevailing wage determination is valid for less than 90 days, the petition will be denied. *See* 20 C.F.R. § 656.40(a) and (c). *See also Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

Beyond the assertions made in the attachment to the director's notice of certification, another issue to be discussed in this case is whether the duties listed on the prevailing wage request coincide with the duties of the proffered position as set forth on the ETA Form 9089 and as advertised to U.S. workers in the petitioner's posting notice. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the potential grounds for denial in the initial decision or notice of certification. *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 cases on a *de novo* basis).

The PWD form submitted and which the petitioner attempts to correct via the facsimile transmission from the EDD dated July 2, 2007 and the letter from the EDD dated October 22, 2007 is not for the instant beneficiary. Rather, it is a wage determination made for a different foreign worker. More significantly, the prevailing wage request/PWD form does not list the same RN job duties as the duties required of the proffered RN position on the Form 9089. The prevailing wage request form at Item 14 indicates that that position requires only that the RN "under supervision of physician and nurse supervisor...conduct nursing assessments." Yet, the Form 9089 at Section H, Item 11, indicates that the RN duties of the proffered position would be performed independently, and would require that the RN conduct *advanced* nursing assessments. The prevailing wage request specifies at Item 12 that the RN position listed on that form does not involve supervising *any* workers. However, at Section H, Part 11, the position listed on the Form 9089 requires that the RN *supervise* support staff at the medical center.

The prevailing wage request form specifies that the SWA is providing a PWD for an RN, skill level 1 position. Yet, based on the proffered position's required duties, it appears that it is an RN position at a higher skill level. The U.S. Department of Labor (DOL), Foreign Labor Certification Online Wage Library & Data Center, www.flcdatacenter.com/skill.aspx (accessed November 26, 2007) indicates that the duties of skill level one positions are carried out under close supervision and are closely monitored and reviewed for accuracy. Generally, where a foreign worker must independently perform the duties of the proffered position and where the

basis as a courtesy to employers such that they are not obliged to resubmit a prevailing wage request. However, the EDD is able to generate such corrected PWD forms for only a limited period after issuing the original PWD form. In this instance, it appears that the employer either reviewed the PWD form upon receipt, but failed to notice any error, or it simply did not review the PWD form to make certain that it met regulatory requirements. As such, neither the employer nor its representative contacted the EDD about the error until almost two years after the EDD had issued the form. At that point, it was too late for the EDD to issue a corrected PWD form. In sum, it appears that there is a system in place by which SWAs can and do assist employers when there are errors on their PWD forms, but the instant employer and its attorney did not avail themselves of this assistance in a timely manner. Again, this office would note that the burden is on the petitioner to demonstrate that its petition meets all legal requirements.

duties require advanced skills, the DOL defines the position at a higher skill level than skill level/wage level 1. *See Id.* The DOL specifies that the wage/skill level should be “commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as described in the employer’s job opportunity.” *See Id.*

It is equally important to note that nurses with the instant petitioner have a union and collective bargaining agent. Thus, as noted on the PWD form in the record, the SWA did not have the authority in that case to base its prevailing wage determination on its occupational employment statistics (OES) for the position and its defined wage levels, such as RN, skill level 1; RN, skill level 2; and so forth. *See 20 C.F.R. § 656.40(b).* Rather, the SWA was obliged to obtain from the petitioning employer a properly negotiated collective bargaining agreement (CBA) which included a negotiated wage for the position as defined in the prevailing wage request, a position that the SWA defined as an RN, skill level 1 position. *See Id.* As the position listed on the Form 9089 involves an RN position which includes responsibilities and skills beyond those listed on the prevailing wage request in the record, this PWD form may not be used in conjunction with the instant petition. Rather, it is incumbent upon the petitioner to obtain a different prevailing wage request/PWD form from the SWA which lists duties that coincide with the proffered position and on which the SWA lists this position’s corresponding negotiated wage as determined by a CBA submitted to the SWA. That is, the petitioner must document for the record that the nurses’ union had the opportunity to negotiate for a higher wage based on the added responsibilities and advanced skills required of the proffered position, should it choose to do so.

This office notes that even if the petitioner were to file a new prevailing wage request with the SWA at this date, it would not be able to demonstrate that it filed the instant petition during the validity period of the SWA PWD, as required by the regulations. *See 20 C.F.R. § 656.40(c).*

In sum, the SWA PWD form submitted into the record may not be used to support the instant petition because it does not meet regulatory requirement that it include a validity period of at least 90 days, and because it lists a CBA negotiated wage for a position with duties that appear to be less complex and require less independent judgment than the proffered position.

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 petition is denied.