



U.S. Citizenship  
and Immigration  
Services

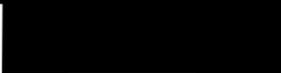
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FILE:



Office: TEXAS SERVICE CENTER

Date:

NOV 07 2007

SRC-06-199-52757

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:

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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a healthcare staffing 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 9089, Application for Permanent Employment Certification (ETA Form 9089 or labor certification) accompanied the petition. As set forth in the director's July 3, 2006 denial, the director determined that the petitioner had failed to comply with the Department of Labor (DOL)'s notification requirements and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific 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.

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.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be "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 [Citizenship and Immigration Services (CIS)]." 8 C.F.R. § 204.5(d). Here, the priority date is June 16, 2006.

The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

The regulation at 20 C.F.R. § 656.15 states in pertinent part:

- (a) *Filing application.* An employer must apply for a labor certification for a *Schedule A* occupation by filing an application in duplicate with the appropriate DHS office, and not with an ETA application processing center.
- (b) *General documentation requirements.* A *Schedule A* application must include:
  - (1) An *Application for Permanent Employment Certification* form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.
  - (2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as proscribed in § 656.10(d).

The regulation at 20 C.F.R. § 656.10(d) states in pertinent part:

(1) In applications filed under Section 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:

- (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.
- (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 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 the wage and hour notices required by 20 CFR § 516.4 or occupational safety and health notices required by 20 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 the 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.

(3) The notice of the filing of an Application for Alien Employment Certification must:

- (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;
- (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.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the 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 pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. The relevant evidence in the record includes two notices of filing and two prevailing wage determinations (PWD).

<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which

With the initial filing the petitioner submitted two notices of filing and two PWDs. One notice of filing indicates that the petitioner offered \$25 per hour to the beneficiary for the service of registered nurse, and that the notice was posted at the petitioner's office located at [REDACTED] from April 25, 2006 to May 10, 2006. One PWD issued by the State of Connecticut Employment Security Division on April 19, 2006 shows the prevailing wage for a registered nurse in the Farmington, CT area is \$23.52 per hour. The other notice of filing indicates that the petitioner offered \$28.80 per hour to the beneficiary for the service of registered nurse, and that the notice was posted at Highland Hospital located at [REDACTED]. The other PWD issued by the California Employment Development Department (California EDD) on March 20, 2006 shows that the prevailing wage for a registered nurse in the Alameda County, CA area is \$28.80 per hour.

The petitioner must submit evidence that the job posting was posted for at least 10 consecutive business days at the facility or location of the employment in accordance with 20 C.F.R. § 656.10(d)(ii). CIS interprets the "facility or location of the employment" referenced at 20 C.F.R. § 656.10(d)(ii) to mean the place of physical employment. Guidance for Schedule A Blanket Labor Certification effective February 14, 2006 (February 14, 2006 guidance) states in pertinent part that:

**(D) Posting and Prevailing Wage Locations:**

All Schedule A petitions must each meet specific notice of posting requirements which are described below: Effective February 15, 2006, the location of the intended employment for notification purposes will be determined as follows:

**1. If the employer knows where the Schedule A employee will be placed:**

The employer must post the notice at the work-site(s) where the employee will perform the work **and** 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 opportunities in the occupation in question.

The prevailing wage indicated in the notice will be the wage applicable to the area of intended employment where the worksite is located.

**2. If the employer currently employs relevant workers at multiple locations and does not know where the Schedule A employee will be placed:**

The employer must post the notice at the work-site(s) of **all** of its locations or clients (i.e. clients under contract to the staffing employer at the time the employer seeks to post a timely notice of filing for a Schedule A employee) where relevant workers currently are placed, **and** publish the notice of filing internally using electronic and print media according to the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage will be derived from the area of the staffing agencies' headquarters.

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are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

**3. If the work-site(s) is unknown and the employer has no current locations or clients:**

The application would be denied based on the fact that this circumstance indicates no bona fide job opportunity exists. The employer cannot establish an actual job opportunity under this circumstance. A denial is consistent with established policy in other foreign labor certification programs where certification is not granted for jobs that do not exist at the time of application.

In the instant case, counsel claims that the petitioner falls in the second situation. The petitioner claims in its supporting letter dated February 16, 2006 that it "is a national healthcare staffing company specializing in placing Registered Nurses and Licensed Practical Nurses on travel nursing assignments primarily in acute and sub-acute care hospitals and healthcare facilities throughout the United States." Both the ETA Form 9089 and Form I-140 indicate that the beneficiary will work in Farmington, CT and various medical facilities within the U.S. It is also noted that the petitioner's accountant states in the notices to financial statements for 2004 and 2005 that the petitioner "is a national provider of temporary healthcare staffing services. The company provides nurses to hospitals that are located throughout the United States. The majority of nurses are placed in hospitals that are located in the states of California, Connecticut, Maine and North Carolina." However, the petitioner did not submit any evidence showing that the petitioner currently employed relevant workers at multiple locations at the time the ETA Form 9089 and Form I-140 were filed, such as contracts between the petitioner and its clients, a list of locations where the petitioner currently employed its relevant workers, or a list of locations where a notice of filing was posted. The record contains copies of notices posted at Highland Hospital in Oakland, CA and at the petitioner's headquarters in Farmington, CT. However, the petitioner is a staffing agency, but not a healthcare facility, and thus, its headquarters located at 2 Bridgewater Road in Farmington, CT is not a location where the petitioner currently employs relevant workers. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, the petitioner failed to demonstrate that it has multiple locations currently employing relevant workers at the time of filing, and further failed to establish that the second situation guidance should apply to the petitioner.

If it were proven that the petitioner had multiple locations currently employing relevant workers when it filed the instant petition, the petitioner would have had to post a notice of filing at all the locations. The record does not contain such a list of locations where a notice was posted prior to the filing or evidence that the notice was posted at all such locations.

In addition, as previously noted the petitioner in the instant case is a staffing agency headquartered in Farmington, Connecticut. The record does not contain any evidence showing that the petitioner has a health facility at its headquarters location or that the petitioner has another address in Farmington, CT to currently employ relevant workers. Although the petitioner claims on the ETA Form 9089 and Form I-140 that the beneficiary will work in Farmington, CT and various medical facilities within the U.S., it appears unlikely that the beneficiary would perform the duties as a registered nurse at a medical facility in Farmington, CT. The record of proceeding contains a copy of the posting notice, which was placed on the employee bulletin

board at Highland Hospital located at 1411 East 31<sup>st</sup> [REDACTED] on April 7, 2006. On appeal, counsel asserts that the notice of posting was placed at Highland Hospital, the healthcare facility where the anticipated work will be performed, and that the director overlooked the Highland Hospital notice posting. Counsel's argument contradicts her earlier assertion that the petitioner employs relevant workers at multiple locations and does not know where the beneficiary will be placed. Therefore, the petitioner has failed to comply with regulatory prescribed notification requirements.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence. 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).

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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is in this case the date the complete, signed petition (including all initial evidence and the correct fee) is properly filed with CIS. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the priority date is June 16, 2006. The proffered wage as stated on the ETA Form 9089 is \$25.00 per hour (\$52,000 per year). Evidence in the record relevant to the petitioner's ability to pay the proffered wage includes the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2005<sup>2</sup>, and unaudited financial statements for 2004 and 2005.

<sup>2</sup> A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, an LLC formed under Connecticut law, is considered to be an S corporation for federal tax purposes.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel submitted the petitioner's unaudited financial statements for 2004 and 2005. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner's 2005 corporate tax return is the most current return available at the time the petitioner filed the petition. Although 2006 would be most relevant, the AAO will analyze the most current available regulatory-prescribed piece of evidence in the record of proceedings. The petitioner's tax return for 2005 demonstrates that the petitioner had a net income<sup>3</sup> of \$151,031 and net current assets<sup>4</sup> of \$514,185 that year.

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<sup>3</sup> Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on line 23 or line 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

<sup>4</sup> Net current assets are the difference between the petitioner's current assets and current liabilities. According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the

Therefore, it appears that the petitioner had sufficient net income or net current assets to pay the beneficiary the proffered wage. However, CIS records show that the petitioner filed 46 I-140 petitions in 2006, the same year the instant petition was filed. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, 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 Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 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). Assuming all the beneficiaries were offered the same wage as the instant beneficiary, the petitioner needs to demonstrate that it had \$2,392,000 to pay the proffered wages in 2006. However, as previously noted, the petitioner had a net income of \$151,031 in 2005, which was sufficient to cover three proffered wages, or net current assets of \$514,185 in 2005, which was sufficient to cover ten proffered wages. The petitioner's net income or net current assets in 2005 would meet only one fifth of the proffered wages the petitioner should have paid in 2006. The petitioner did not submit its tax return or other regulatory-prescribed evidence for 2006. Therefore, the petitioner failed to establish its ability to pay the proffered wages to all beneficiaries of its petitions, and further failed to establish that its job offer to the beneficiary is a realistic one because the petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic.

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.

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beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.