

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

B6



FILE:

[REDACTED]  
EAC-05-228-51934

Office: VERMONT SERVICE CENTER

Date: OCT 11 2007

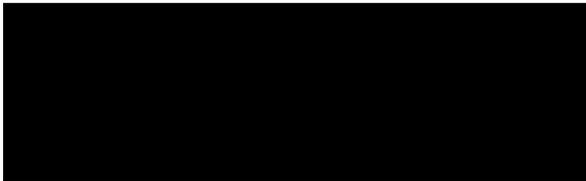
IN RE:

Petitioner:  
Beneficiary:



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

The petitioner is a hospital. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for Schedule A, Group I labor certification pursuant to 20 C.F.R. § 656.5(a). As set forth in the director's March 27, 2006 denial, the director determined that the petitioner did not provide evidence of a proper notice of filing an application for permanent employment certification under the regulation at 20 C.F.R. § 656.10(d). Therefore, the director denied the petition.

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

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 August 16, 2005 with accompanying ETA Form 9089, Application for Permanent Employment Certification. 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 Department of Labor (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. Thus, PERM applies to the instant case.

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 it has been 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 Citizenship and Immigration Services (CIS) office. Pursuant to 20 C.F.R. § 656.15(b), 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 prescribed in § 656.10(d).

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 relevant evidence in the record, including new evidence properly submitted on appeal.<sup>1</sup> Relevant evidence in the record includes three positions available notices in April 2005, May 2005, and April 2005 respectively, a letter dated June 30, 2005 from the petitioner to the New York State Nurses Association (NYSNA), a letter dated September 21, 2005 from the petitioner to NYSNA and two NYSNA Positions Available notices on August 15, 2005. The record does not contain any other documentation relevant to the notice of filing an application for permanent employment certification.

The regulation at 20 C.F.R. § 656.10(d)(1) provides in relevant part:

In applications filed under § 656.15 (Schedule A), . . . 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 regulations quoted above require a petitioner to give notice of the filing of the application for permanent employment certification to the bargaining representative of the petitioner's employees in the occupational classification of the job opportunity in the petitioner's location in the area of intended employment. According to the regulation, the petitioner must post the notice to its employees at the facility or location of employment only if there is no such bargaining representative. In the instant case, on the ETA Form 9089 the petitioner checked the box of yes for an answer to the question #24, that is "Has the bargaining representative for workers in the occupation in which the alien will be employed been provided with notice of this filing at least 30 days but not more than 180 days before the date the application is filed?" and checked the box of NA to the question #25, that is "If there is no bargaining representative, has a notice of this filing been posted for

---

<sup>1</sup> 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). 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). On the Form I-290B filed on April 18, 2006, counsel indicated that she would be sending a brief and/or evidence to the AAO within 30 days. Counsel also submitted a letter dated April 7, 2006 from the petitioner stating that its attorney would forward all documents related to the beneficiary. Since the AAO had received nothing further, the AAO sent a fax to counsel on August 2, 2007 informing counsel that no separate brief and/or evidence was received, to confirm whether or not she would send anything else in this matter, and as a courtesy, providing her with five (5) days to respond. However, to date, more than six (6) weeks later, no reply has been received.

10 business days in a conspicuous location at the place of employment, ending at least 30 days before but not more than 180 days before the date the application is filed?" The petitioner provided letters to NYSNA as the bargaining representative; the letter dated April 7, 2006 from the petitioner also indicated that all its internal posting memos were forwarded to their Bargaining Unit NYSNA. Because the petitioner has a bargaining representative, the petitioner in this case must meet the requirements of providing notice of filing to the bargaining representative, rather than to its employees at the place of employment. Therefore, all the documents of posting notices to the petitioner's employees are irrelevant in the instant case. The director erred in concluding that the petitioner did not meet the requirements of notice of filing based on the fact that the petitioner did not post the notice within 30 to 180 days before the filing. The AAO will only review evidence regarding the notice of filing provided to the bargaining representative in determining whether the petitioner met the requirements of providing notice of filing to its bargaining representative.

According to the regulation at 20 C.F.R. § 656.10(d)(3), the notice of the filing of an Application for Permanent Employment Certification either to the bargaining representative or to the petitioner's employees, 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 regulation at 20 C.F.R. § 656.10(d)(6) also provides:

If an application is filed under the Schedule A procedures at § 656.15, or the procedures for shepherders at § 656.16, the notice must contain a description of the job and rate of pay, and must meet the requirements of this section.

The record of proceeding contains two letters from the petitioner to NYSNA on June 30, 2005 and September 21, 2005 as the evidence of notice of filing to the bargaining representative. As previously noted, the instant petition was filed on August 16, 2005. The notice of filing to the bargaining representative on September 21, 2005 was 36 days after the filing, and therefore, it does not meet the regulatory requirements that the notice of filing must be provided between 30 and 180 days before filing the application. The petitioner failed to establish that it provided a proper notice of filing to the bargaining representative with its September 21, 2005 letter to NYSNA.

The petitioner's letter dated June 30, 2005 to NYSNA states the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity, states any person may provide documentary evidence bearing on the application to the DOL Certifying Officer and shows that the notice of filing appears to be provided to the bargaining representative within 30 days, and contains a description of the job and rate of pay. The notice of filing to NYSNA also provides addresses of the New York State Alien Employment Certification Office and the DOL Regional Certifying Office in New York. However, pursuant to the PERM regulations, the address of the appropriate Certifying Officer for filing an ETA Form 9089, Application for Permanent Employment Certification, in the Bronx, New York area should be [REDACTED] instead of in New York City. Therefore, the petitioner did not provide the address of the appropriate certifying officer in

the notice of filing to NYSNA, and thus did not meet the requirements set forth by the regulation at 20 C.F.R. § 656.10(d)(3)(iii).

In addition, the regulation expressly requires that the notice of filing contain the rate of pay and that the petitioner must offer a wage equal or greater than the prevailing wage. The petitioner's June 30, 2005 letter contains the rate of pay, which is \$48,844 per year. However, the record contains a copy of the prevailing wage determination issued by New York State Department of Labor on May 11, 2005 which indicates that the prevailing wage for a registered nurses or staff nurse in the Bronx, NY area is \$58,844 per year. Therefore, the petitioner's June 30, 2005 letter to NYSNA does not meet the rate of pay requirements.

Therefore, the AAO cannot conclude that the petitioner provided a proper notice of filing to the bargaining representative as required by the PERM regulations. Although the director was in error in reasoning his decision on the fact that the notice was posted only one day before this petition was filed, the AAO still concurs with the director's determination that the petitioner did not provide evidence of a proper notice of filing an application for permanent employment certification under the regulation at 20 C.F.R. § 656.10(d). The director's March 17, 2006 decision must be affirmed.

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).

In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That provides further provides: "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 establish the prospective employer's ability to pay the proffered wage."

The petitioner submitted a letter dated March 16, 2005 from [REDACTED], Vice President & CFO/Finance as evidence to establish the petitioner's ability to pay the proffered wage in the instant case since the petitioner claimed to currently employ more than 625 workers. However, given the record as a whole and the petitioner's history of filing petitions, we find that CIS need not exercise its discretion to accept the letter from [REDACTED]. CIS records indicate that the petitioner has filed twenty-four (24) Form I-140 petitions with CIS service centers. In addition, the petitioner has also filed two (2) Form I-129 nonimmigrant petitions. Consequently, CIS must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. 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 ETA 750A job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). If we examine only the salary requirements relating to the I-140 petitions, the petitioner would be need to establish that it has the ability to pay combined salaries of \$1,412,256. Neither the petition nor the letter from [REDACTED] provided information about the petitioner's net income or net current assets. Given that the number of immigrant petitions reflects an increase of the petitioner's workforce, we cannot rely on a letter from [REDACTED] referencing the ability to pay a single unnamed beneficiary.

As we decline to rely on [REDACTED] letter, we must examine the other financial documentation, such as annual reports, federal tax returns, or audited financial statements, as evidence of a petitioner's ability to pay the proffered wage as required by the regulation at 8 C.F.R. § 204.5(g)(2). However, the record of proceeding does not contain any regulatory-prescribed evidence submitted to establish the petitioner's continuing ability to pay all the proffered wages as of the priority date until each of the beneficiaries obtains lawful permanent residence. Therefore, the petitioner failed to demonstrate its continuing ability to pay all the proffered wages.

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.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

**ORDER:** The appeal is dismissed.