

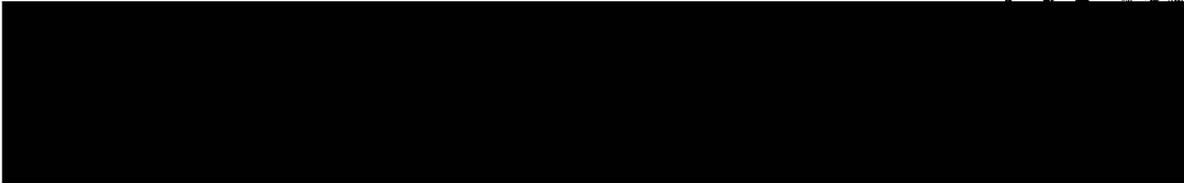
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U.S. Citizenship
and Immigration
Services

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Handwritten initials/signature



OCT 17 2007

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:
SRC 06 145 51382

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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

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. § 656.5, Schedule A, Group I. As set forth in the director's June 2, 2006 denial, the director determined that the petitioner had failed to demonstrate that the proffered wage equals or exceeds the prevailing wage.

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.

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 April 6, 2006, 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 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.

Aliens who will be permanently employed as professional nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.5 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. § 656.5, aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, (2) hold a full and unrestricted license to practice professional nursing in the state of intended employment, or (3) have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) administered by the National Council of State Boards of Nursing.

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, a Schedule A application shall 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 first issue in this case is whether the petitioner has offered the beneficiary the prevailing wage. 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 appeal¹.

The Form I-140 petition states that the beneficiary will be paid \$760-\$1,000 per week as a registered nurse. With the petition, the petitioner submitted an employment agreement dated October 19, 2006 between the petitioner and the beneficiary offering the beneficiary employment as a full-time registered nurse at the rate of no less than \$21.00 per hour. The petitioner also submitted a Notice of Filing with the petition which stated that the rate of pay "will be \$24.00 or above the prevailing wage for the location of the job." Further, with the petition, the petitioner submitted a prevailing wage determination issued by the Georgia Department of Labor on March 3, 2006 which indicates that the prevailing wage for the position of registered nurse (Level III) is \$52,458.00 per year. Finally, with the petition, the petitioner submitted Form ETA 9089, Application for Permanent Employment Certification, which states that the prevailing wage is \$20.27 per hour and that the offered wage in the instant case is \$24.00 per hour.

The regulation at 20 C.F.R. § 656.15(b) requires an Application for Permanent Employment Certification form for Schedule A to include a prevailing wage determination in accordance with § 656.40 and § 656.41. Further, the regulation at 20 C.F.R. § 656.10(c)(1) requires the employer to attest on Form ETA 9089 that the offered wage equals or exceeds the prevailing wage. In her decision, the director noted that while the petitioner may use a wage range, the bottom of the range must be the prevailing wage. The director also noted that the prevailing wage in the instant case is \$52,458.00 (\$25.22 per hour) and that the wage offer is \$24.00 per hour. Thus, the director determined that the offered wage is less than the prevailing wage.

On appeal, the petitioner submits a memorandum in support of its appeal and a Prevailing Wage Determination issued by the Georgia Department of Labor on March 15, 2006 for the position of registered nurse (Level I). In its memorandum, the petitioner states that due to a clerical error, the wrong prevailing wage determination was attached to the petition. The petitioner asserts that the proffered position is for an entry level (Level I) registered nurse, and that the correct prevailing wage determination submitted on appeal demonstrates that the petitioner has offered the prevailing wage to the beneficiary. The Prevailing Wage Determination issued by the Georgia Department of Labor on March 15, 2006 for the position of registered nurse (Level I) indicates that the prevailing wage is \$42,762.00 per year (\$20.56 per hour). This office accepts the prevailing wage determination submitted on appeal. The petitioner has demonstrated that the offered wage of \$24.00 per hour is greater than the prevailing wage of \$20.56 per hour.

¹ 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).

However, beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying nursing training or experience. 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, 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).

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In the instant case, the Form ETA 9089, Section H, Items 4-6, set forth the minimum education, training, and experience that an applicant must have for the position of registered nurse. In the instant case, Section H describes the requirements of the proffered position as follows:

4. Education	Nursing diploma or certificate for two years of study
4-B. Major Field of Study	Nursing
5. Training	No training required in addition to RN diploma
6. Experience	No

The Form ETA 9089 states that a foreign educational equivalent is acceptable. Further, Section H, Item 14 of Form ETA 9089 reflects the following special requirements:

1. Must have a minimum of two years nursing training or experience
2. Must hold a valid license as an RN in the country of Nursing education
3. Must hold a valid full and unrestricted US RN license, C.G.F.N.S. certificate or have passed the NCLEX exam²

The beneficiary set forth her credentials on Form ETA 9089 and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. At Section J, the beneficiary indicated that she received her RN diploma in 1996 after three years of education at [REDACTED]. At Section K, eliciting information of the beneficiary's work experience, she represented that she worked as a registered nurse at Grampian University Hospitals NHS Trust in Scotland from January 2003 to the date she signed the ETA 9089 on June 20, 2005. She does not provide any additional information concerning her employment background on that form.

² While Section H, Items 4-6 do not require training or experience in addition to the educational requirement of a nursing diploma or certificate for two years of study in the field of nursing, Section H Item 14 adds a minimum requirement of two years of nursing training or experience in addition to the educational requirement.

With the petition, the petitioner submitted an NCLEX-RN Candidate Report issued to the beneficiary indicating that she passed the NCLEX examination on January 26, 2006. The petitioner also submitted the beneficiary's Diploma in General Nursing & Midwifery indicating that the beneficiary passed the General Nursing & Midwifery Exam in July 1996. The diploma states that her period of training was from July 1993 to June 1996. The record also contains the beneficiary's Certificate of Registration for Nurse dated March 25, 1997 issued by [REDACTED] indicating that the beneficiary took a course of training at Visakha School of Nursing from July 1993 to June 1995³ and that she passed the Examination for Nurses in September 1995 and is admitted to the register of nurses.⁴

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(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 or the experience of the alien.

(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.

The petitioner provided evidence with the petition to establish that the beneficiary possesses the required educational credentials for the proffered position. Further, the record shows that the beneficiary holds a valid license as an RN in the country of nursing education (India) and has passed the NCLEX exam. However, the preponderance of the evidence does not establish that the beneficiary possesses a minimum of two years nursing training or experience as required by Section H, Item 14 of the ETA 9089. Specifically, the petitioner did not submit a letter as required by 8 C.F.R. § 204.5(l)(3). Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent to the beneficiary's qualifications. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

³ This office notes that dates of the beneficiary's education do not match; the beneficiary's diploma states that her period of training was from July 1993 to June 1996 while her Certificate of Registration for Nurse states that her training was from July 1993 to June 1995. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). On remand, the petitioner must address this inconsistency.

⁴ The record also contains correspondence from the Nursing Midwifery Council addressed to an unknown individual.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.