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U.S. Citizenship
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FILE: [Redacted]
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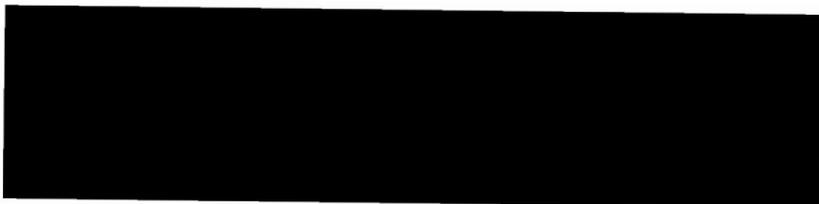
Office: NEBRASKA SERVICE CENTER

Date: JAN 31 2008

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and 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 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 (Form ETA 9089 or labor certification) accompanied the petition. The director determined that the petitioner had failed to submit a valid Prevailing Wage Determination (PWD) that meets the requirements of 20 C.F.R. §§ 656.10 and 656.15 and that the petitioner failed to 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) because the notice contains the rate of pay lower than the prevailing wage. Accordingly, 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.

As set forth in the director's March 14, 2007 denial, the primary issues in this case are whether or not the petitioner submitted a valid PWD and whether or not the petitioner provided evidence of a proper notice of filing to the bargaining representative under the regulation.

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 July 17, 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.

The regulation at 20 C.F.R. § 656.40 states 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 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.¹ On appeal, counsel submits a brief. Relevant evidence in the record includes a copy of a PWD issued by the Employment Development Department (EDD), State of California, on February 2, 2006 (CA February 2, 2006 PWD) and a copy of a PWD issued by the EDD on July 25, 2006 (CA July 25, 2006 PWD).

The CA February 2, 2006 PWD expressly indicates that this PWD was issued on February 2, 2006 and valid until June 30, 2006. The CA July 25, 2006 PWD was issued on July 25, 2006 and the EDD officer checked “90 days from the date of this determination” box for its validity period. That means the CA July 25, 2006 PWD is valid from July 25, 2006 to October 23, 2006. The instant petition was filed with the labor certification application on July 17, 2006. At the time of filing, the CA February 2, 2006 PWD had already expired, however, the CA July 25, 2006 PWD had not been issued yet. Therefore, the director determined that the petitioner failed to submit a valid PWD with the petition at the time of filing and denied the petition accordingly.

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).

On appeal, counsel cites the regulation at 20 C.F.R. § 656.40(c) with emphasis added to “OR” between the languages “employers must file their applications” and “begin the recruitment required by Sec. 656.17(d) or 656.21 within the validity period specified by the SWA” and argues that the director neglects to recognize that while the validity dates specified on the PWD may in fact be expired on the date of the filing of the immigrant petition, the PWD may still be valid because the recruitment required by the labor certification process was commenced within the validity period of the PWD.

As quoted previously in this decision, according to the regulation at 20 C.F.R. § 656.40(c), an employer can be considered to use a SWA PWD as long as the employer either files its application or begins the recruitment required by 20 C.F.R. §§ 656.17(d) or 656.21 within the validity period specified by the SWA. In the instant case, the petitioner failed to file its application within the validity period specified by the EDD, i.e. June 30, 2006. Now counsel asserts that the petitioner began the recruitment within the validity period. However, the instant petition is for registered nurse.

The regulation at 20 C.F.R. § 656.10 General instructions states that:

(a) Filing of applications. A request for a labor certification on behalf of any alien who is required by the Act to be a beneficiary of a labor certification in order to obtain permanent resident status in the United States may be filed as follows:

(1) Except as provided in paragraphs (a)(2), (3), and (4) of this section, an employer seeking a labor certification must file under this section and Sec. 656.17.

(2) An employer seeking a labor certification for a college or university teacher must apply for a labor certification under this section and must also file under either Sec. 656.17 or Sec. 656.18.

(3) An employer seeking labor certification for an occupation listed on Schedule A must apply for a labor certification under this section and Sec. 656.15.

(4) An employer seeking labor certification for a shepherd must apply for a labor certification under this section and must also choose to file under either Sec. 656.16 or Sec. 656.17.

The regulations governing the alien labor certification for registered nurse listed on Schedule A are 20 C.F.R. §§ 656.10 and 656.17. The regulation at 20 C.F.R. §§ 656.17(d) or 656.21 is not applicable to the labor certification application for a registered nurse, like the instant case. In addition, the regulation at 20 C.F.R. § 656.17(d) governs re-filing procedures² and the regulation at 20 C.F.R. § 656.21 provides guidance on supervised recruitment.³ The instant petition involves neither re-filing procedures nor supervised recruitment.

² The regulation at 20 C.F.R. § 656.17(d) states in pertinent part that:

(d) Refiling procedures. (1) Employers that filed applications under the regulations in effect prior to March 28, 2005, may, if a job order has not been placed pursuant to those regulations, refile such applications under this part without loss of the original filing date by:

³ The regulation at 20 C.F.R. § 656.21 states in pertinent part that:

Sec. 656.21 Supervised recruitment.

(a) Supervised recruitment. Where the Certifying Officer determines it appropriate, post-filing supervised recruitment may be required of the employer for the pending application or future applications pursuant to Sec. 656.20(b).

Since the petitioner failed to submit a valid PWD with the filing on July 17, 2006, the petitioner failed to comply with the requirement of the PWD validity period.

Counsel's assertions on appeal cannot overcome the ground of the director's denial that the petitioner had failed to submit a valid PWD that meets the requirements of 20 C.F.R. §§ 656.10 and 656.15. The AAO concurs with the director's decision on this issue.

The second issue in the instant case is whether or not the petitioner provided evidence of a proper notice of filing to the bargaining representative under the regulation at 20 C.F.R. § 656.10(d).

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.

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 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 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 a letter dated May 26, 2006 addressed to the director (the petitioner's May 26, 2006 letter) and a copy of notice of filing of application for alien employment certification under U.S. Department of Labor Schedule A, Group I dated April 16, 2006 (April 16, 2006 notice of filing) as the evidence that notice of filing was provided to the 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 sheepherders at § 656.16, the notice must contain a description of the job and rate of pay, and must meet the requirements of this section.

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 to or greater than the prevailing wage. The rate of pay contained in the April 16, 2006 notice is \$36.88 per hour. The director determined that the petitioner failed to provide a proper notice of filing to the bargaining representative because the rate of \$36.88 is lower than the prevailing wage. The record shows that the rate of \$36.88 was the prevailing wage determined by the CA February 2, 2006 PWD based on the survey on December 31, 2005 from collective bargaining agreement (CBA)-SEIU/SF-DHR, however, the PWD expired on June 30, 2006, before the filing date in the instant case. Therefore, the rate of \$36.88 was no longer the prevailing wage at the time of filing. The record contains the CA July 25, 2006 PWD which shows that the petitioner offered the rate of \$38.36 and the same was determined as the prevailing wage based on the survey on July 1, 2006 from CBA-SEIU/SF DHR. Although the CA July 25, 2006 PWD was not issued and valid on or before July 17, 2006, the filing date, it is most likely that the petitioner would get the same prevailing wage if a PWD were issued on or before July 17, 2006. Nonetheless, the notice of filing provided to the bargaining representative contains a prevailing wage not valid at the time of filing. Therefore, the petitioner failed to provide a proper notice of filing to the bargaining representative.

This office also notes that the notice of filing provided to the bargaining representative does not provide the address of the appropriate Certifying Officer as required by the regulation at 20 C.F.R. § 656.10(d)(3)(iii). Moreover, although the petitioner claimed in the petitioner's May 26, 2006 letter to the director that "[t]he attached application for Alien Employment Certification was provided to the Nurses' Bargaining Union SEIU Local 790 on April 16, 2006" and the notice of filing attached was dated April 16, 2006, the petitioner did not submit any evidence to support its assertion. The record does not contain any letter dated April 16, 2006 from the petitioner addressed to the Nurses' Bargaining Union SEIU Local 790 or any evidence showing the notice of filing or a copy of the Application for Permanent Employment Certification form was sent or delivered to the bargaining representative. 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)).

The regulation requires the notice of the filing must state any person may provide documentary evidence bearing on the application to the Certifying Office and provide the address of the appropriate Certifying

Officer. While the notice submitted in the instant case states that any person may provide evidence bearing on the application to the local Employment Service Office and/or the Regional Certifying officer of the Department of Labor, it does not provide any address of the appropriate Certifying Officer. The petitioner failed to provide the address of the appropriate certifying officer in its notice of filing to the bargaining representative and thus, failed to comply with the requirements of notification by the regulation at 20 C.F.R. § 656.10(d)(3).

Counsel's assertion on appeal cannot overcome the director's decision and evidence submitted does not establish that the petitioner has provided a proper notice of filing to the bargaining representative as required by the PERM regulations. The AAO 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 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.