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



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

*Handwritten initials*

[Redacted]

FILE: [Redacted]  
SRC 06 162 52046

Office: TEXAS SERVICE CENTER

Date: **OCT 03 2008**

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:

[Redacted]

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.

*Handwritten signature of Robert P. Wiemann*

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 an employment/staffing company. It seeks to employ the beneficiary permanently in the United States as a staff nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. An ETA Form 9089, Application for Permanent Employment Certification (ETA 9089 or labor certification) accompanied the petition. The director determined that the petitioner had failed to comply with the regulatory requirements relating to the beneficiary's qualifications as a registered nurse and denied the petition accordingly.

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. The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

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 April 28, 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).

(c) *Group I documentation.* An employer seeking labor certification under Group I of Schedule A must file with DHS, as part of its labor certification application, documentary evidence of the following:

\* \* \*

(2) An employer seeking a Schedule A labor certification for an alien to be employed as a professional nurse (§ 656.5(a)(1)) must file as part of its labor certification application documentation that the alien has received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); that the alien holds a full and unrestricted (permanent) license to practice nursing from the state of intended employment; or that the alien has passed the National Council Licensure Examination for Registered Nurse (NCLEX-RN). Application for certification of employment as a professional nurse may be made only under this §656.15(c) and not under § 656.17.

In this matter, Part F of the ETA 9089 indicates that the occupation title of the certified job is a registered nurse. Part H of the ETA 9089 states that the beneficiary will be employed as a staff nurse at the Horizon Care Center in Arverne, New York. Relevant to the requirements for employment, item 14 of Part H of the ETA 9089 requires the applicant to be eligible to practice nursing in New York, or if foreign trained, must have a VisaScreen Certificate and license in home country.

Relevant to the beneficiary's qualifications, the director issued three communications to the petitioner; a request for evidence on June 2, 2006; an intent to deny on September 8, 2006; and a notice of intent to deny on March 14, 2007. On June 2, 2006, the director advised the petitioner to provide evidence that the beneficiary had received a CGFNS, held a full and unrestricted permanent license to practice nursing in the state of intended employment or had passed the NCLEX-RN. The petitioner submitted a response pertinent to other matters but failed to submit any of the three documents requested by the director.

The director reiterated her request for evidence of the beneficiary's licensure in her intent to deny issued on September 8, 2006. In response, by letter dated September 28, 2006, the petitioner failed to submit any evidence related to the beneficiary's licensure as a registered nurse, but requested an extension of ninety (90) days or until January 8, 2007 in order to provide such evidence. By letter, dated January 5, 2007, the petitioner failed to submit any licensure evidence and requested another sixty (60) days or until March 8, 2007 to provide such evidence.

By letter dated January 9, 2007, the petitioner indicated that it was submitting proof of the beneficiary's qualifications and enclosed a copy of an online website indicating that the beneficiary had been licensed on January 8, 2007 in California as a registered nurse. The petitioner also provided a copy of a letter dated December 29, 2006, from the California Board of Registered Nursing indicating that the beneficiary had passed the NCLEX-RN examination but awaited the submission of her social security number to issue the RN license.

On March 14, 2007, the director issued a notice of intent to deny to the petitioner. She noted that the beneficiary's passing of the NCLEX-RN as indicated on the letter from California but noted that evidence related to the beneficiary's qualifications must be dated prior to April 28, 2006, the date that the petition was filed. The director requested a certified letter from New York which confirmed the beneficiary's eligibility to be issued a license to practice nursing in that state or evidence that the beneficiary had passed the CGFNS<sup>1</sup> examination prior to April 28, 2006.

In response, by letter dated April 10, 2007, the petitioner provided a copy of a notice dated November 6, 2006 from The University of the State of New York, The State Education Department, Division of Professional Licensing Services indicating that the beneficiary's education was approved and that she was eligible to sit for the NCLEX examination.

On May 9, 2007, the director denied the petition. She concluded that none of the documents submitted showed that the beneficiary's qualifications for licensure were completed by the April 28, 2006 filing date of the petition.

On appeal, the petitioner provides a copy of the beneficiary's nursing license from New York and asserts that the director erred in denying the petition because the copy had been earlier provided on May 4, 2007. The petitioner supplies a copy of a letter sent to the director indicating that the copy of the beneficiary's New York license was attached.

The AAO concurs with the director's denial of the petition. It is noted that the copy of the beneficiary's New York nursing license was not delivered to the Service Center until May 9, 2007, according to the relevant online postal service tracking system. Moreover, the copy of the license provided fails to reflect the date of issue on its face. The relevant New York website reveals that the beneficiary's nursing license in that state was not issued until April 30, 2007.<sup>2</sup>

As noted by the director, the filing date of the petition was April 28, 2006. The earliest evidence of the beneficiary's qualifications pursuant to the requirements of 20 C.F.R. § 656.15(c)(2) occurred on December 29, 2006 when she was advised of passage of the NCLEX-RN. This was approximately eight months following the filing of the petition. Her licensure in New York occurred on April 30, 2007, a year after filing the petition. Therefore, the petitioner has not established that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. 656.5(a), Schedule A, Group I as of the filing date of the petition. The regulation at 8 C.F.R. § 103.2(b)(12) states, in pertinent part:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility *at the time the application or petition was filed.* (Emphasis supplied)

If the petition was not already eligible for approval when the petition was filed, subsequent developments cannot retroactively establish eligibility as of the filing date. *See Matter of Katigbak, 14 I&N Dec. 45, 49 (Reg. Com. 1971.)*

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<sup>1</sup> The correct designation of the examination is the NCLEX-RN .

<sup>2</sup> See <http://www.nysed.gov/COMS/OP001/OPSCR2>.

Beyond the decision of the director, it is noted that the notice of posting of the job opportunity intended to 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, failed to contain an accurate and complete address of the Department of Labor Certifying Officer location where individuals may provide documentary evidence bearing on the application for certification under 20 C.F.R. § 656.10(d)(3)(iii). According to the DOL's Frequently Asked Questions (FAQs) found online at <http://www.foreignlaborcert.doleta.gov/faqs.cfm>, (Question 3 under Notice of Filing and Question 4 under How to File) the address of the DOL certifying officer for New York is located at:

United States Department of Labor  
Employment and Training Administration  
Atlanta National Processing Center  
Harris Tower  
233 Peachtree Street, N.E. , Ste. 410  
Atlanta, Georgia 30303

On the copy of the notice of posting provided to the director, the petitioner merely stated an internet address rather than providing the actual address of the Department of Labor Certifying Officer. As such, this notice is deficient.

It is further noted that although the director included requests relating to the petitioner's continuing ability to pay the proffered wage of \$54,080 per annum pursuant to the provisions of 8 C.F.R. § 204.5(g)(2) requiring federal tax returns, audited financial statements, or annual reports, the petitioner failed to provide such evidence relating to its financial ability in 2005 or 2006, although it provided a federal tax return and unaudited financial statements relating to 2004. As this petition was filed on April 28, 2006, the omission of **nearly a year and a half of financial documentation cannot be overlooked, particularly since the petitioner has a history of filing for multiple beneficiaries.** It is noted that reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

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 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.