

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 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE:



Office: NEBRASKA SERVICE CENTER

Date: OCT 29 2008

LIN-06-135-51472

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 Acting Director (Director), Nebraska 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 September 21, 2006 decision, the director denied the petition based on the petitioner's failure to properly post notice of filing an application for permanent employment certification for ten consecutive business days.

The record shows that the appeal is properly filed and timely. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(3)(A)(i) of 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.

On April 3, 2006, the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse. 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 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, 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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Given that the instant matter was accompanied by an application for Schedule A designation, the priority date for this petition is the date the ETA Form 9089 was properly filed with CIS on April 3, 2006. See 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$23.00 an hour or \$47,840 annually.

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.¹ On appeal, counsel submits a brief, a letter dated September 27, 2006 from the petitioner, Interoffice Memorandum by William R. Yates, Associate Director Operations issued on September 23, 2005 (Yates September 23, 2005 memo), HQPRD70/8.5, and Department of Labor (DOL) Permanent Labor Certification Frequently Asked Questions, Number 7, February 21, 2006, reprinted from www.foreignlaborcert.doleta.gov (DOL FAQ No. 7) as new evidence to support the appeal. Other relevant evidence in the record includes a notice of application for permanent employment certification and a posting certification from Dale Smith, Director, Human Resources dated March 24, 2006. The record does not contain any other documentation relevant to the issue of whether the petitioner properly posted notice of filing an application for permanent employment certification for ten consecutive business days.

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

In applications filed under §§ 656.15 (Schedule A), 656.16 (Shepherders), . . . 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...
- (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 must 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 29 CFR 516.4 or occupational safety and health notices required by 29 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.

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).

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 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 record reflects that the petitioner posted notice of filing an application for permanent employment certification at its facility from Friday, February 17, 2006 through Thursday, March 2, 2006. The director noted that Monday, February 20, 2006 was a federal holiday, and thus, the notice was posted for only nine consecutive business days.

On appeal counsel submits a letter from the petitioner claiming that the hospital is open 24 hours a day, seven days a week, it does not observe holidays, and in fact, the petitioner was open for regular business on Monday, February 20, 2006. Counsel also argues that excluding Saturdays, Sundays and federal holidays from business days is not supported by regulations and guidelines from DOL.

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. One of the new changes in the PERM regulation is that a notice of filing must be posted “ten business days” instead of “ten days,” the requirement under the regulation in effect prior to March 28, 2005. The new PERM regulation mandates that it be posted ten business days.

On appeal counsel asserts that the director erred in interpreting the term “business day” as a day other than Saturday, Sunday or a federal holiday, and submits DOL FAQs No. 7 to support his assertions. Counsel’s reliance on DOL FAQs No. 7 is misplaced. The portion of DOL FAQs No. 7 counsel quoted is not the answer to a question on how to define the term “business day” or how to calculate ten business days, but an answer to a question “May I post a Notice of Filing for a permanent labor certification indefinitely?” However, DOL issued Permanent Labor Certification Frequently Asked Questions Round 9 (DOL FAQs No. 9) on November 29, 2006. DOL FAQs No. 9 states in pertinent part that:

TIMEFRAMES

How do I count days to establish recruitment timelines and time periods as outlined by the regulation?

... ..

Time Periods are the number of days during which an activity must take place. Examples of time periods are the requirement a job order must be placed for 30 days and the requirement that a Notice of Filing must be posted for ten consecutive business days. When counting a time period, both the start date and end date are included in the count. Thus, if a job order is on the State Workforce Agency web site from February 1, 2007, through March 8, 2007, February 1st, is day 1, February 2nd, is day 2, March 2nd, is day number 30, March 8th, is day number 36.

... ..

As another example, the regulation requires a Notice of Filing posting for a time period of ten consecutive business days. If the order is posted on Monday, April 30, 2007, Monday is day 1, Friday, May 4th, is day 5; the following Monday, May 7th, is day 6; and Friday, May 11th, is day 10. May 11th, is the last day of this time period and is therefore defined as the event and is not counted when calculating the 30 day restriction prior to filing timeline. To calculate the 30 day timeline, May 12th, is day 1, May 13th, day 2, May 23rd, day 12; May 31st, day 20; and June 10th, is day 30. The application can be filed on June 10, 2007.

Examples of the earliest filing date permissible for a particular Notice of Filing posting or job order placement date are as follows:

If the Notice of Filing is posted on Thursday, June 28, 2007, the posting dates must be June 28 – July 12, and the earliest filing date permissible is Saturday, August 11, 2007, (the notice of filing must be posted for ten consecutive business days and, therefore, neither weekends nor the Fourth of July are counted).

See http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_11-29-06.pdf (accessed on October 20, 2008).

The DOL PERM regulation expressly requires that a notice of filing be posted for at least ten consecutive business days. DOL defines the term “business day” by excluding Saturdays, Sundays and federal holidays in counting ten consecutive business days. Monday, February 20, 2006 is a federal holiday designated as “Washington’s Birthday” in section 6103(a) of title 5 of the United States Code, which is the law that specifies holidays for federal employees. See https://www.opm.gov/Operating_Status_Schedules/fedhol/2006.asp (accessed on October 20, 2008). Therefore, this office concurs with the director’s decision that the petitioner posted the notice of filing for nine business days prior to the priority date, and thus the posting does not meet the requirements for posted notices to the employer’s employees as set forth at 20 C.F.R. § 656.10(d)(1)(ii).

Counsel asserts on appeal that the director failed to give the petitioner an opportunity to cure any deficiencies in this petition pursuant to 8 C.F.R. § 103.2(b)(8). The purpose of the request for evidence (RFE) is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). In this case, the regulations clearly require that the petitioner must post the notice of filing for ten consecutive business days between 30 and 180 days before filing the application. The petition was filed on April 3, 2006. Since the petitioner did not meet the ten-business-day posting requirement prior to April 3, 2006, the petitioner failed to establish eligibility for the

benefit sought at the time of filing. Any subsequent effort would not make the already deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In addition, the AAO notes that no additional evidence to demonstrate that the petitioner posted the notice of filing for ten consecutive business days excluding Saturdays, Sundays and federal holidays was submitted with the instant appeal. The petitioner must establish eligibility at the time the Form I-140 was filed. See 8 C.F.R. § 103.2(b)(12). Thus, this deficiency would not be overcome were the petitioner to publish notice of its application for employment certification at this date.

Counsel's assertions on appeal cannot overcome the ground of the director's denial that the petitioner had not established that it had properly posted notice of filing an application for permanent employment certification for ten consecutive business days as set forth by the regulation at 20 C.F.R. § 656.10(d)(1). Therefore, the director's 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).

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. 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 Form ETA 750 as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

On the petition, the petitioner claimed to have been established in 1973 and to currently employ 1700 workers. Although counsel's submission letter dated March 15, 2006 indicated that a financial statement and/or corporate annual report would be submitted with the initial filing, the record does not contain any documentation relating to the petitioner's financial ability except a support letter dated March 24, 2006 from [REDACTED], Director, Human Resources of the petitioner stating that the petitioner had the financial means to

pay the prevailing wage to the beneficiary. In his decision, the director pointed out that there were no financial documents submitted. On appeal, counsel submits another letter dated September 29, 2006 from [REDACTED] with a copy of the financial statements.

The regulation at 8 C.F.R. § 204.5(g)(2) allows the director to accept a statement from a financial officer of the prospective United States employer with 100 or more workers which would establish the prospective employer's ability to pay the proffered wage. 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] in this case. The record of proceeding shows that [REDACTED] is the Director of Human Resources with the petitioner. The letter from [REDACTED] cannot be accepted as a statement from a financial officer of the petitioner, and thus does not meet the requirement set forth by the regulation quoted above. In addition, CIS records indicate that the petitioner has filed multiple Form I-140 petitions and 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. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. Therefore, we cannot rely on a letter from a human resources director of the petitioner referencing the ability to pay a single beneficiary.

As we decline to rely on [REDACTED] letter, we need to examine the other financial documentation submitted. The petitioner must establish its continuing ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The instant petition was filed on April 3, 2006 and the subsequent appeal is currently pending with the AAO, and therefore, the petitioner must establish its ability to pay for 2006 to the present. The petitioner did not submit its tax returns or annual reports for these relevant years. The record contains the petitioner's financial statements submitted on appeal.

The financial statements submitted on appeal are a one-page Monthly Profit/Loss & Statistics August 2006 and a one-page Monthly Profit/Loss & Statistics YTD August 2006 without accountant's report. Counsel's reliance on unaudited financial records is misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In addition, financial statements for August 2006 and Year-To-Date August 2006 cannot establish the petitioner's ability to pay the proffered wage for 2007 onwards, and they even cannot demonstrate that the petitioner had sufficient net income or net current assets to pay the beneficiary the proffered wage in 2006, the year of the priority date.

Therefore, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, and its net income or net current assets.

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.