

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

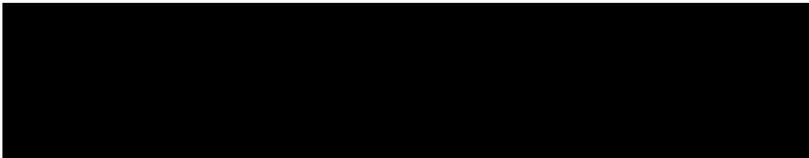
PUBLIC COPY

U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

B6



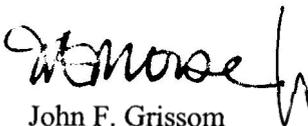
FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 10 2009  
EAC 06 080 52037

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.  
If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
John F. Grissom  
Acting 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 medical center. 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 set forth in the director's January 8, 2007 denial, the director determined that the petition was not accompanied by the required prevailing wage determination (PWD). The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes specific allegations 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140), together with ETA Form 9089, Application for Permanent Employment Certification, for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse on January 20, 2006.<sup>1</sup> Aliens who will be permanently employed as registered nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.5 for which the Secretary of the U.S. Department of Labor (DOL) 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: (1) have received a certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); (2) hold a permanent, full and unrestricted license to practice nursing in the state of intended employment; or (3) have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

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 United States 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

---

<sup>1</sup> 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 [United States Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d).

(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.

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 USCIS 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 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 [State Workforce Agency (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. Unless the employer chooses to appeal the SWA's prevailing wage determination under Sec. 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with an ETA application processing center and maintains the SWA PWD in its files. The determination shall be submitted to an ETA application processing center in the event it is requested in the course of an audit....

(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 primary issue in this case is whether the petition was accompanied by the required prevailing wage determination.

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<sup>2</sup>. On appeal, the petitioner submits a brief; a printout of the Online Wage Library-OES Wage Search Results from <http://www.flcdatabcenter.com> for the position of registered nurse in the New York, NY MSA for calendar year 2005; a FAQ from the DOL dated August 1, 2005 entitled “Foreign Labor Certification Prevailing Wage Determinations for Nonagricultural programs;”<sup>3</sup> an undated affirmation from [REDACTED], the petitioner’s former counsel; a document entitled “Filing Procedures;” an affirmation dated March 8, 2007 from [REDACTED]; a PWD issued to the petitioner on February 15, 2007 by the New York State Department of Labor for the proffered position in Brooklyn, New York on behalf of the beneficiary, valid through June 30, 2007; a PWD issued to Professional Placement and Recruitment, Inc. on January 17, 2006 by the New York State Department of Labor for the position of professional nurse in Bronx, New York on behalf of [REDACTED], valid through December 31, 2006; a letter dated March 1, 2007 from the petitioner; an affidavit dated March 1, 2007 from the beneficiary; a complaint filed by the beneficiary on March 2, 2007 with the First Judicial Department Departmental Disciplinary Committee in New York, New York against [REDACTED]. The record also contains a Posted Notice for the position of registered nurse and a letter dated October 25, 2006 from the petitioner regarding the notice of filing.

On appeal, counsel asserts that there is no statutory requirement that a Schedule A based I-140 petition must be accompanied by the actual prevailing wage determination. Counsel also states that even if the PWD is required, the failure to provide the PWD is a *de minimis* technicality which does not prejudice the I-140 petition. Counsel further asserts that if the PWD is deemed a requirement, the failure to provide the PWD should be excused as a matter of discretion due to the ineffective assistance of the petitioner’s former counsel.

The regulations clearly require that a Schedule A based I-140 petition be accompanied by a prevailing wage determination from the SWA. 20 C.F.R. § 656.15; 20 C.F.R. § 656.40. The requirement cannot be excused. The PWD issued to the petitioner on February 15, 2007, by the New York State Department of Labor for the proffered position in Brooklyn, New York on behalf of the beneficiary, is valid from February 15, 2007 through June 30, 2007. Therefore, it does not meet the requirements of 20 C.F.R. § 656.40, as the petitioner did not file its application or begin the recruitment required by §§656.17(d) or 656.21 within the validity period. Further, the PWD issued to Professional Placement and Recruitment, Inc. on January 17, 2006 by the New York State Department of Labor for the position of professional nurse in Bronx, New York on behalf of [REDACTED]

---

<sup>2</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).

<sup>3</sup> The DOL FAQ states that the employer must request a PWD from the SWA. Pursuant to a request for evidence (RFE) dated September 26, 2006, the director gave the petitioner an opportunity to submit the PWD. However, the petitioner did not submit the proper PWD from the SWA. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

[REDACTED], valid through December 31, 2006, does not meet the requirements of 20 C.F.R. § 656.40, as it was not issued to the petitioner.

Pursuant to *Matter of Lozada*, any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

*Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988).<sup>4</sup> Each requirement will be examined below.

First, pursuant to *Matter of Lozada*, the claim must be supported by an affidavit of the allegedly aggrieved petitioner setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the petitioner in this regard. *Id.* at 639. Instead of presenting an affidavit of the petitioner on appeal, the petitioner's current counsel submits an affidavit of the beneficiary, dated March 1, 2007. He also fails to include the representation agreement between the petitioner and [REDACTED]. Therefore, the first requirement of *Matter of Lozada* has not been met.

Second, pursuant to *Matter of Lozada*, the petitioner's former counsel must be informed of the allegations leveled against him and be given an opportunity to respond. *Matter of Lozada*, 19 I&N Dec. at 639. This requirement has been met.

Third, pursuant to *Matter of Lozada*, the motion must reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of former counsel's ethical or legal

---

<sup>4</sup> On January 7, 2009, the United States Attorney General (AG) published a decision finding that persons in removal proceedings have no right under the U.S. Constitution to be represented by an attorney. *Matter of Compean*, 24 I&N Dec. 710 (A.G. 2009). *Matter of Compean* overruled *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) and *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003), which held that the right to counsel was a matter of due process. *Matter of Compean* also set forth a new substantive and procedural framework for reviewing claims of ineffective assistance of counsel. On June 3, 2009, the AG vacated the decision in *Matter of Compean* and directed the Board of Immigration Appeals and Immigration Judges to apply the decision in *Matter of Lozada* for claims of ineffective assistance of counsel, pending promulgation of relevant regulations. 25 I&N Dec. 1 (A.G. 2009).

responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. at 639. On appeal, counsel submits a copy of a complaint filed with the First Judicial Department Departmental Disciplinary Committee in New York, New York by the beneficiary against [REDACTED]. However, the proper complainant to satisfy the third requirement of *Matter of Lozada* in connection with a Form I-140 petition is the petitioner, not the beneficiary. See 8 C.F.R. § 204.5(c). The record does not contain a complaint filed by the petitioner with the appropriate disciplinary authorities with respect to any violation of the petitioner's former counsel's ethical or legal responsibilities, and does not contain an explanation as to why the petitioner did not file such a complaint. Therefore, the third requirement of *Matter of Lozada* has not been met.

The petition was not accompanied by the required PWD and, therefore, the petition remains denied. It is noted that, even if the petitioner had articulated a claim under *Matter of Lozada* of ineffective assistance of counsel, it is unclear how the relief requested could be granted. As the petitioner failed to submit the required PWD, the petition cannot be approved.

Beyond the decision of the director, the record does not contain evidence that the petitioner properly posted notice of filing the application for permanent employment certification. 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 at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

The posting notice provided by the petitioner does not meet the regulatory requirements governing posting requirements. Under 20 C.F.R. § 656.10(d)(1), the regulations require the following:

In applications filed under §§ 656.15 (Schedule A), 656.16 (Shepherders), 656.17 (Basic Process), 656.18 (College and University Teachers), and 656.21 (Supervised Recruitment), 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 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.

Additionally, 20 C.F.R. § 656.10(d)(3) requires the following:

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.

Specifically, the posting failed to meet the requirements of 20 C.F.R. § 656.10(d)(3)(iii), as it does not provide the address of the appropriate Certifying Officer. For employment in New York, the proper address of the appropriate Certifying Officer<sup>5</sup> is:

United States Department of Labor  
Atlanta National Processing Center  
Harris Tower  
233 Peachtree Street, N.E., Suite 410  
Atlanta, Georgia 30303

This office finds that this posting does not meet the requirements for posted notices to the employer's employees as set forth at 20 C.F.R. § 656.20(d)(3)(iv). Additionally, the petitioner did not provide evidence that the notice was published internally using in-house media in accordance with the petitioner's normal internal notification procedures as required by 20 C.F.R. § 656.10(d)(1).

---

<sup>5</sup> See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#notefile3> (accessed June 22, 2009).

The petition will be denied for the reasons discussed above, with each considered as an independent and alternative basis for denial.<sup>6</sup> The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

---

<sup>6</sup> When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.