

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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

PUBLIC COPY



U.S. Citizenship  
and Immigration  
Services



B6

FILE: [REDACTED]  
EAC 06 094 52696

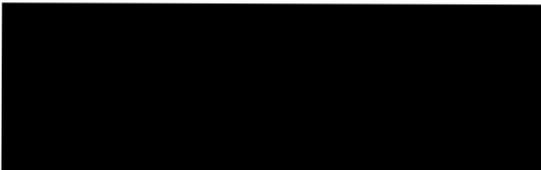
Office: VERMONT SERVICE CENTER

Date:  
AUG 12 2009

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:



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, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the immigrant visa petition on October 4, 2006. The petitioner filed an appeal which the director determined was untimely. The director however treated the appeal as a motion to reopen and subsequently denied the petition again on January 11, 2007. The petitioner filed a second appeal which the director erroneously identified as untimely. The director subsequently transmitted the matter to the Administrative Appeals Office (AAO) as an appeal. The appeal will be dismissed.

The petitioner operates a healthcare business, and seeks to employ the beneficiary permanently in the United States as a registered nurse pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(2), and section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provide 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii).

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the 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.

Based on 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file Form I-140, “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.”<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 [U.S. Citizenship and Immigration Services (USCIS)].” 8 C.F.R. § 204.5(d).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced

---

<sup>1</sup> On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

by the employer's completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d). Also, according to 20 C.F.R. § 656.15(c)(2), aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, or (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment, or (3) that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). The record contains evidence with regard to the beneficiary's nursing license with the state of Pennsylvania, her passage of the CGFNS examination, and her 2005 Bachelor of Science in nursing diploma from Eastern University, St. Davids, Pennsylvania.

On October 4, 2006, the director denied the petition because the petitioner failed to properly post the position in accordance with 20 C.F.R. § 656.10(d)(1) and failed to submit a valid prevailing wage determination in accordance with 20 C.F.R. § 656.40. The director determined that the petitioner had not posted its notice of filing, posted from November 30, 2005 to December 12, 2005, for ten consecutive business days. The director noted that the DOL relies on the definition of business day found at 29 C.F.R. § 2510.3-102(e), namely, "any day other than Saturday, Sunday or any day designated as a holiday by the Federal Government." The director noted that December 3rd, 4<sup>th</sup>, 20<sup>th</sup> and 11<sup>th</sup> all fall on weekends, and the petitioner had not posted the notice of filing for the requisite ten consecutive business days. He also determined that the petitioner did not comply with the regulatory requirements that proper notice of filing must have been provided between 30 and 180 days prior to the filing of the application.

The director further noted that the I-140 petition was accompanied by the required prevailing wage determination with validity dates of October 19, 2005 to December 31, 2005. The director noted that the prevailing wage determination could not be considered valid for the purposes of filing the labor certification as it was not valid for at least 90 days, and that the prevailing wage determination expired prior to the filing of the instant petition.

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.<sup>2</sup> On appeal, counsel submits a brief and the following evidence:

1. Copies of two Foreign Labor Certification Case summary transmitted to counsel by the Harrisburg Pennsylvania State Workforce Agency (SWA) for two workers. One document indicates a state office date receipt date of October 3, 2005, while the second indicates a state office date of October 11, 2005. On both documents, the certifying officer states the prevailing wage determination is valid until December 31, 2005;

---

<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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

2. A copy of document that counsel identifies as “DOL PERM FAQ #6.” This document addresses what to do with the prevailing wage determination provided by the State Workforce Agency is incorrect or incomplete; and
3. A copy of a partial list of work schedules for employees of Mercy Fitzgerald Hospital for March to July, September through October, and December 2006 that indicates the employees worked throughout the seven day week.

The record shows that the appeal is properly filed, timely and makes an 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.

On appeal, counsel states that director’s interpretation of the term “business day” in C.F.R. §. 656.10(d)(1)(ii) is incorrect, and cites *Chevron US. A., Inc v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-43(1984). Counsel states that the U.S Supreme Court established a two-prong framework for review of administrative interpretations. First, if Congressional intent is clear, the agency must “give effect to the unambiguously expressed intent of Congress,” and if Congress has not directly addressed the exact issue in question, the agency’s construction of the status or regulation will be upheld so long as it is reasonable. Counsel notes that the director states that the term “business day” is not defined in 20 C.R.F. § 656.10. Counsel contends that the intent behind 20 C.F.R. § 656.10(d)(1)(ii) is to provide a conspicuous notice to U.S workers of the filing of a labor certification applicant. This intent, according to counsel, was satisfied in the instant case.

Counsel refers to the petitioner’s 2006 employment schedules submitted on appeal and notes that the employees of the hospital work every day of the year, including weekends and federal holidays. Counsel concludes that an interpretation of “business days” that includes all days that employees work for the petitioner clearly satisfies Congressional intent. Otherwise, employees who happen to work on weekend or holiday shifts during the posting period may not be notified of the filing of the application for permanent employment certification.<sup>3</sup> Counsel finally notes that the director based his interpretation of the term “business days” on the definition of the term in 29 C.F.R. § 2510.3-102 a separate and unrelated DOL regulation governing the administration of pension and welfare benefits. In contrast counsel states the emphasis in 20 C.F.R. § 656.10 (d)(1)(ii) is not on speed, but on notification to employees. Counsel also notes that the petitioner, even with the director’s interpretation of the term “business day,” posted notice of the application for the permanent employment certification for nine consecutive days, one day less than the requisite ten consecutive business days. Counsel states that such harmless error should also be excused in Schedule A petitions.

The AAO disagrees that the petitioner’s error is “harmless,” because a regulatory requirement under 20 C.F.R. § 656.10(d), provides:

---

<sup>3</sup> Counsel appears to suggest that the posting notice would be removed over the weekend days, a concept that is not contemplated anywhere in the regulations or DOL FAQs.

- (1) 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:

...

(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. . . . 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.

(3) The notice of the filing of an Application for Permanent Employment Certification shall:

- (i) State that 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.

...

(6) If an application is filed under the Schedule A procedures at § 656.15. . . the notice must contain a description of the job and rate of pay and meet the requirements of this section.

Additionally, section 212 (a)(5)(A)(i) of the Act states the following:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified . . . that

- (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

Fundamental to these provisions is the need to ensure that there are no qualified U.S. workers available for the position prior to filing. The required posting notice seeks to allow any person with evidence related to the application to notify the appropriate DOL officer prior to petition filing. *See* the Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); *see also* Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).

To be eligible for a Schedule A petition, as set forth above the petitioner would need to have posted the position pursuant to 20 C.F.R. § 656.10(d)(3)(iv) 30 to 180 days prior to the February 8, 2006 filing, and have met the other requirements of 20 C.F.R. § 656.10(d).

As the director noted in his decision, the regulation at 29 C.F.R. § 2510.3-120(e) defines a "business day" as "any day other than Saturday, Sunday or any other day designated as a holiday by the Federal Government." Counsel's assertions with regard to the use of this DOL regulatory criteria are not viewed as persuasive.

The notice states that it was posted for "10 consecutive days," rather than the "10 consecutive business days" required to meet the PERM regulations. As the director correctly noted, the petitioner posted the posting notice for nine consecutive business days. The AAO finds that the petitioner did not meet the regulatory criteria outlined at 20 C.F.R. § 656.10 (d)(ii). The director's decision will be affirmed.

The AAO also notes that the petitioner did not identify the actual place of employment on its posting notice as required by regulation. Although the petitioner states in its cover letter that it offered the beneficiary the position of registered nurse at Mercy Fitzgerald Hospital, the posting notice notes "multiple sites" rather than any registered nurse position at Mercy Fitzgerald Hospital. Further pursuant to 20 C.F.R. § 656.10(d)(1)(ii), the petitioner did not specifically identify where the posting notice was posted, beyond the phrase "in a conspicuous place at the prospective workplace." DOL has provided guidance on the PERM regulations and posting requirements. *See* <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (accessed August 4, 2009.) DOL guidance related to posting notices provides: "If the employer knows where the Schedule A employee will be

placed, the employer must post the notice at that work-sites (s) where the employee will perform the work.”

An additional issue in the instant petition is that the petitioner’s posting notice is not compatible with the petitioner’s ETA Form 9089 with regard to the required minimal educational requirements. In Section H-4 of the ETA Form 9089, the petitioner indicated that the minimum educational requirement for the position is an associate’s degree, while section H-4B indicates the major field of study is nursing. In Section H-8 and H-8A the petitioner did not indicate any acceptable alternate level of education. However, the posting notice indicates the petitioner “seeks registered nurses with a Bachelor of Science degree in nursing.” The petitioner stated in its cover letter dated January 24, 2006, that the petitioner’s website indicates the position requires at least an associate’s degree in nursing, although a bachelor’s degree is preferred.” If the petitioner pursues the matter further, these additional deficiencies with the posting notice have to be addressed.

The second issue raised by the director was that the petitioner failed to obtain a prevailing wage determination (PWD) in compliance with 20 C.F.R. § 656.40 from the relevant State Workforce Agency (SWA) prior to filing. The regulation at 20 C.F.R. § 656.40 specifically sets forth that the petitioner must request a wage and the wage obtained is assigned a validity period. In order to use a PWD, “employers must file their [Schedule A] applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.” *See* 20 C.F.R. § 656.40(c). The petitioner must file Form ETA 9089 and Form I-140 with the prevailing wage determination issued by the SWA having jurisdiction over the proposed area of employment. *See* 20 C.F.R. § 656.15(b)(i). A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

On appeal, counsel asserts that the SWA erred in issuing the PWD for less than the minimum 90 days validity period. Counsel states that the director should correct the PWD in accordance with DOL policy. Counsel notes that at the time of the petitioner’s request for a prevailing wage determination in October 2005, the Pennsylvania SWA routinely issued defective PWDs with validity dates ending on December 31, 2005 despite the regulation requiring that PWD be issued for 90 days. Counsel refers to the two PWDs issued by the Pennsylvania SWA in 2005 that he submits to the record as evidence of this problem. Counsel further notes that on February 24, 2006, after the filing of the instant petition, DOL recognized that some SWAs were issuing defective PWDs and blamed the problem in part of the newness of the PERM program which became effective as of March 25, 2005.

Counsel notes that the DOL FAQ #6 excerpt states that if a petitioner has an application submitted before March 25, 2006 that was denied due to an error associated with an incorrect or incomplete PWD, the petitioner may submit a request for review to the appropriate certifying officer, including a copy of the corrected PWD provided by the SWA or a copy of the initial PWD obtained from the SWA with an explanation of how it should be corrected.

Counsel then states that since the Department of Homeland Security, not DOL, makes final determinations on Schedule A labor applications, the petitioner was unable to request review and

correction of the PWD from the DOL as provided in the PERM FAQs #6. Counsel also notes that the DOL PERM FAQ #6 was not issued until after the filing of the instant petition, and that the petitioner had no guidance on the correction of SWA errors on PWDs before the submission of the petition. Counsel states that USCIS should not hold the petitioner responsible for the SWA error on the petitioner's pre-March 25, 2006 application and should either correct the PWD or permit the petitioner to obtain a new, valid PWD.

The PWD in the record of proceeding is dated October 19, 2005 and indicates at the bottom of the page that the PWD is valid until December 31, 2005. Accordingly, the PWD was valid for considerably less than the requisite 90 days. The record reflects no attempt on the part of former or current counsel to submit the instant PWD for correction to the appropriate SWA after the issuance of the DOL guidance. Any corrections to PWDs would be determined by the agency with jurisdiction and authority to both issue and/or reissue the documents. Counsel's assertion on appeal that USCIS should correct the PWD is not persuasive.

Beyond the decision of the director, the AAO notes that the petition has additional deficiencies. 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 petitioner has not established that it has the ability to pay the proffered wage. 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Schedule A petition with uncertified ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by USCIS *See* 8 C.F.R. § 204.5(d). In the instant case, the I-140 petition was filed on February 8, 2006. On the I-140 petition, the petitioner indicated it was established in 1968, had a gross annual income of \$267,667,000 and currently employed 1717 employees. The proffered wage stipulated on Form ETA 9089 is \$21.78 an hour, or \$45,032.40 for a forty hour work week.

In support of its ability to pay the proffered wage, with the I-140 petition, the petitioner submitted an unaudited financial statement for Mercy Health System of SEPA, dated January 26, 2006. Although the petitioner stated in its cover letter to the I-140 petition that it was paying the beneficiary at or

above the proffered wage, it submitted no further evidence to the record to further establish this assertion.

The petitioner'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.

The AAO notes that the petitioner states it employs 1717 workers. The regulation at 8 C.F.R. § 204.5(g)(2) states that in the case of petitioners with more than 100 workers, the statement of a financial officer may suffice to show the petitioner's ability to pay the proffered wage. However, the petitioner in the instant case has not provided such documentation.

The AAO also notes that USCIS databases indicate the petitioner has filed 133 I-129 or I-140 petitions over the past four years. Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). See also 8 C.F.R. § 204.5(g)(2). The petitioner is also obligated to pay the prevailing wage to each of its H-1B employees. Therefore the petitioner has not established its ability to pay the proffered wage.

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.