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U.S. Citizenship  
and Immigration  
Services

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FILE:

EAC 06 032 51934

OFFICE: VERMONT SERVICE CENTER

Date: FEB 04 2009

IN RE:

Petitioner:

Beneficiary:

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 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, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a nursing agency. 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. § 656.5, Schedule A, Group I. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089 or labor certification) accompanied the petition.

On February 20, 2007, the director denied the petition based on the petitioner's failure to respond to the director's notice of intent to deny (NOID) the petition issued on September 27, 2006. By that notice, the director determined that the petitioner had failed to comply with the regulatory requirements relating to the beneficiary's qualifications as a registered nurse, failed to submit the required prevailing wage determination (PWD) entered by the State Workforce Agency (SWA) having jurisdiction over the proposed area of intended employment, and that the petitioner failed to comply with the Department of Labor (DOL)'s notification requirements and denied the petition accordingly.

On appeal, the petitioner, through counsel, maintains that by submitting a response to the director's first request for additional evidence issued on January 13, 2006, the requested evidence relating to the beneficiary's licensure and a copy of an internal notice of posting the job opportunity had been provided. Counsel submits a revised notice on appeal and provides the New York SWA / PWD. Counsel asserts that the petition should be approved.<sup>1</sup>

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).

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), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees.

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<sup>1</sup> 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 regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Immigrant Petition for Alien Worker (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 [United States Citizenship and Immigration Services (USCIS)].” 8 C.F.R. § 204.5(d). Here, the priority date is November 3, 2005.

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 Department of Labor 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. Therefore these regulations apply to this case because the filing date is November 3, 2005.

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 prescribed 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.

The regulations at 20 C.F.R. § 656.40 state 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.

It is further noted that requirements for the petitioner to provide evidence of its notice of posting of the job opportunity, are set forth within the regulation at 20 C.F.R. § 656.10(d), which states in pertinent part:

- (1) In applications filed under Section 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 shall 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.

(Emphasis added.)

\* \* \*

(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 pre-PERM procedure to post the availability of the job opportunity to interested U.S. workers was set forth at 20 C.F.R. § 656.20(g)(1). Relevant to the notice provided to the bargaining

representative or, if no bargaining representative, to the employer's employees, the regulation provided in pertinent part:

- (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 shall be posted for at least *10 consecutive days*. The notice shall be clearly visible and unobstructed while posted and shall 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, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

(Emphasis added.)

With the initial filing of the I-140 on November 3, 2005, the petitioner provided a copy of the beneficiary's licensure as a registered nurse in Vermont as of October 10, 2005, but failed to submit evidence of licensure in the state of New York, which was the state of intended employment as indicated on the ETA Form 9089. The petitioner also failed to provide evidence of a notice of posting the job opportunity, and did not provide evidence of the beneficiary's educational credentials.

The director requested evidence from the petitioner, pursuant to regulatory requirements, that it must provide evidence that the beneficiary has received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS) or that the alien holds a full and unrestricted (permanent) license to practice nursing from the state of intended employment, or that the beneficiary has passed the National Council Licensure Examination for Registered Nurse (NCLEX-RN). The director advised the petitioner that a Vermont license was not evidence of a license in New York. The director also instructed the petitioner to provide evidence that the posting of the job opportunity was accomplished for ten consecutive business days. Finally, the petitioner was asked to provide evidence of the beneficiary's educational credentials including copies of relevant grade transcripts. In this request for evidence, the director did not request a copy of the relevant PWD from a SWA.

In response, the petitioner did not provide any documentation relevant to the beneficiary's possession of a nursing license in New York, possession of a CGFNS certificate or proof that he passed the NCLEX-RN. Rather, counsel asserted that the beneficiary's Vermont licensure was proof that he passed the NCLEX-RN and that his New York license was available by endorsement or reciprocity. Counsel provided a letter, dated February 7, 2006, after the I-140 petition filing and priority date, from the New York licensing authorities indicating receipt of the beneficiary's application and advising the beneficiary that as soon as all requirements were met, his credential would be issued.

The first notice of posting submitted indicated that it was posted from August 29, 2005 to September 9, 2005, indicating that it was posted for nine consecutive business days (not including the labor day

holiday on September 5) rather than ten consecutive business days as required by regulation. Clarification on this calculation may also be found on DOL's online database of Frequently Asked Questions and Answers (FAQS) found at <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm>. (Question 5 under Time Frames).<sup>2</sup>

Additionally, this notice failed to advise whether the petitioner published the notice in its in-house media and failed to specify the correct address to which interested persons might provide evidence. The correct address as set forth in the DOL Frequently Asked Questions and Answers (Question 3 under Notice of Filing) is The United States Department of Labor, Employment and Training Administration, Atlanta National Processing Center, Harris Tower, 233 Peachtree St., N.E., Ste. 410, Atlanta, Georgia 30303. <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm>. Finally, this notice failed to indicate exactly where it was posted.

The director's notice of intent to deny again notified the petitioner that it must submit the CGFNS certificate, passage of the NCLEX-RN or an unrestricted license to practice nursing in the state of intending employment. The director also instructed the petitioner to provide a PWD issued by the pertinent SWA and to provide a copy of a notice that the job opportunity was posted for ten consecutive business days. Finally, the director requested evidence that the notice of filing the Application for Permanent Employment Certification was provided between 30 and 180 days before the visa petition was filed.

As mentioned above, the petitioner failed to respond to the director's NOID. The director denied the petition based on the petitioner's lack of response. The director concluded that the petitioner had not provided evidence that would overcome the deficiencies discussed in the NOID and requested from the petitioner.

Counsel's assertion on appeal that the petitioner's earlier response to the director's request for evidence was acceptable is insufficient. Counsel's assertion that the beneficiary's licensure in Vermont as sufficient to establish his passage of the NCLEX-RN is misplaced. The regulation at 20 C.F.R. § 656.15(c)(20) clearly requires that the labor certification application documentation must include documentation that the beneficiary has received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS) or that he holds a full and unrestricted (permanent) license to practice nursing from the state of intended employment, or that he has passed the National Council Licensure Examination for Registered Nurse (NCLEX-RN). Here, none of the beneficiary's evidence included any of these documents. Only on appeal did the petitioner submit the beneficiary's NCLEX, dated October 10, 2005, as well as a copy of his New York license. The date of the New York license was October 30, 2006, nearly a year after the priority date of

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<sup>2</sup>Specifically, DOL's FAQS give examples of how to calculate "time periods as outlined by the regulation." An example provided states the if the Notice of Filing is posted on Thursday, June 28, 2007, the posting dates must be from June 28-July 12, and the earliest filing date permissible is Saturday, August 11, 2007 (notice of filing must be posted for "ten consecutive *business* days and, therefore neither weekends nor the Fourth of July are counted).

November 3, 2005. Similarly, a revised notice of posting the job opportunity submitted on appeal indicates that it was posted from October 16, 2006 until October 27, 2006, nearly a year after the priority date and not in compliance with the regulation at 20 C.F.R. § 656.10(d)(3)(iv) because it was not provided between 30 and 180 days before filing the application. Additionally, for the first time on appeal, the petitioner provided a copy of the PWD issued by the SWA. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In addition to the deficiencies already noted, none of the newly submitted documents will be considered as properly submitted on appeal. The purpose of the request for evidence 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). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency as set forth in the director's NOID, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's NOID. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed for these reasons.

Beyond the decision of the director, it is noted that Part H of the ETA Form 9089 provided that the beneficiary should have an associate's degree in nursing. The only alternate level of education and experience specified on Part H, 8-A is a bachelor's degree. The beneficiary's educational documents do not reflect that he possesses an associate's or bachelor's degree. They indicate that he completed a nursing program at the Georgetown School of Nursing and was awarded a certificate of training, reflecting that the beneficiary began this program on September 14, 1993 and completed it on September 13, 1996. The petitioner failed to provide any corroboration or credentials evaluation that this program represented the attainment of a U.S. equivalent associate's or bachelor's degree.

Further, the evidence does not demonstrate the petitioner's continuing financial ability to pay the proffered wage of \$55,000 pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). This regulation provides:

*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. 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. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

The ability to pay a proffered wage may be established if a petitioner has employed a beneficiary during a given period. If the payment of compensation equals or exceeds the proffered wage during a specified period, then the petitioner's ability to pay the wage is established for that period of time. If a petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well supported by federal case law. *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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.<sup>3</sup>

In this case, the petitioner provided a copy of its 2004 federal tax return and a copy of a letter from Leslie Forde C.P.A. who certified that the firm had gross receipts of approximately \$4.76 million dollars for the year 2005. Although the petitioner's 2004 federal tax return (Schedule L) indicated that the petitioner's current assets exceeded its current liabilities by an amount sufficient to pay the proffered wage, the C.P.A.'s letter is not sufficient to demonstrate the petitioner's ability to pay the

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<sup>3</sup> Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

proffered wage in 2005, where the petition was filed on November 3, 2005. There is no evidence that the petitioner employed 100 persons or more or that the letter affirmed the petitioner's ability to pay the proffered wage, rather than simply affirm gross receipts in 2005. For such an extended period of time, the petitioner's evidence for 2005 should have consisted of one of the required forms of evidence such as an audited financial statement. As the record currently stands, the petitioner did not demonstrate its continuing ability to pay the certified salary of \$55,000 per year.

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.