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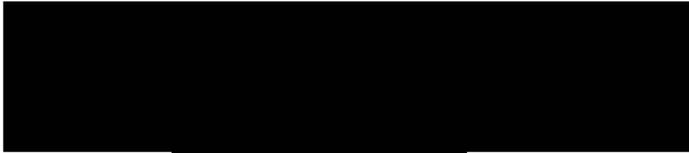
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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Services

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FILE:



OFFICE: NEBRASKA SERVICE CENTER

Date: FEB 04 2009

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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, Nebraska Service Center. The petitioner's motion to reopen was also denied. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a healthcare firm. 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, a Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 or labor certification) accompanied the petition. The director determined that the petitioner had 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 in that the application for labor certification was not filed with the validity period specified on the PWD that was provided. The director also determined that the notice of posting the job opportunity did not correctly reflect the rate of pay as determined by the PWD. The petition was denied on February 6, 2007.

On a motion to reopen, the petitioner, through counsel asserts that the initial PWD was erroneously submitted. It submits a second PWD, which contains a different amount for the prevailing wage and a different validity period. Counsel further contends that the prevailing wage determination is controlled by the collective bargaining agreement and the posting notice correctly reflected that wage.

On May 11, 2007, the director reaffirmed his original denial and determined that the SWA controlled the determination of the prevailing wage, not the collective bargaining agreement. The director additionally found that the job posting did not correctly reflect the prevailing wage and that the posting did not reflect that the notice of the employment opportunity was ever provided to the bargaining unit representative.

On appeal, the petitioner, through counsel, maintains that the submission of a copy of a collective bargaining agreement between the petitioner and the Illinois Nurses Association controlled the prevailing wage opportunity and that the offered wage met the applicable requirements sufficient for the petition's approval.¹

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

¹ 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.

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.

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 December 20, 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 December 20, 2005.

The ETA Form 9089 submitted with the petition indicates on Part F that the SWA determined the prevailing wage to be \$21.93 and that the determination date was September 12, 2005, which expired on December 31, 2005. The wage offer to the beneficiary listed on the ETA Form 9089 as well as the posting notice, however, was \$21.70 per hour, or \$.23 less than the prevailing wage. Additionally, on the ETA Form 9089, Part F, the petitioner checked “OES,” the Occupational Employment Statistics as the wage source and not “CBA” or Collective Bargaining Agreement.

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).

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.

With the initial filing of the I-140, the petitioner did not submit evidence of a SWA prevailing wage determination. In response to the director's request for evidence, the petitioner submitted a PWD issued by the SWA which indicated a determination date of March 22, 2006, a validity period as the calendar year in which it was issued and a prevailing wage for a registered nurse as \$22.78 per hour. As the application for labor certification was filed on December 20, 2005, the director concluded that it did not comply with the regulation at 20 C.F.R. 656.40(c), as stated above, to file the application or begin the recruitment within the validity period specified by the SWA. The director denied the petition.

On motion, counsel provides another PWD issued by the Illinois SWA. This PWD is identical to the first PWD provided by the petitioner to the director except that the determination date is September 12, 2005, which is stated to be valid for the calendar year in which it is issued. The prevailing wage set forth on this PWD is \$21.93 per hour. Counsel also supplies a copy of the collective bargaining agreement between the petitioner and the Illinois Nurses Association. It indicates that it covers the

period between March 25, 2005 and March 24, 2008. As counsel states on motion, on page 36, the agreement indicates that the wage rate schedule shows hourly wages of \$21.70 per hour for a new graduate nurse. Increasing wage rates are based on years of credited experience. Counsel asserts that this is the appropriate proffered wage because the terms of the Collective Bargaining Agreement override any prevailing wage rate set by an SWA.

The director reaffirmed the original denial, concluding that the terms of the bargaining agreement did not control the PWD issued by the Department of Labor through the SWA and therefore the offered wage of \$21.70 failed to meet or exceed the prevailing wage rate of \$21.93 as set forth on the second PWD submitted by the petitioner with the motion to reopen. The director also determined that the wage rate was not correctly reflected on the notice of job posting and that the notice did not indicate that a bargaining unit representative had been notified.

On appeal, counsel reiterates previous assertions and cites the regulation at 20 C.F.R. § 656.40(b)(1) as supporting the contention that the collective bargaining agreement (CBA) controls the determination of the prevailing wage for labor certification purposes. Counsel also asserts that only the posting requirements related to the contents of advertisements filed under the basic labor certification process under 20 C.F.R. § 656.17(f), and not Schedule A applications, require a statement of a rate of pay not lower than the PWD from the SWA.

At the outset, because of the stated PWD of \$21.93, and the determination date of September 12, 2005, as set forth on Part F of the ETA Form 9089, we accept that the petitioner intended to use the PWD determination that was submitted with the motion to reopen and erroneously provided the earlier one to the director. For that reason, the December 20, 2005, application for labor certification provided to the director with the visa petition was filed with the validity period of the dates required by the regulation at 20 C.F.R. § 656.40(c).

This office does not find counsel's assertions related to the collective bargaining agreement's power to set the prevailing wage to be persuasive.²

At the outset, the regulation at 20 C.F.R. § 656.10 provides in pertinent part as follows:

- (c) *Attestations.* The employer must certify to the conditions of employment listed below on the Application for Permanent Employment Certification under penalty of perjury under 18 U.S.C. 1621(2). Failure to attest to any of the conditions listed below results in a denial of the application.

² Additionally, the petitioner failed to identify on ETA Form 9089, Part F, that the wage source was based on a collective bargaining agreement. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

(1) The offered wage equals or exceeds the prevailing wage determined pursuant to § 656.40 and §656.41, and the wage the employer will pay to the alien to begin work will equal or exceed the prevailing wage that is applicable at the time the alien begins work or from the time the alien is admitted to take up the certified employment.

Pursuant to 20 C.F.R. § 656.40, the state workforce agency, not USCIS, is empowered to make a determination of the prevailing wage for labor certification purposes, including those filed for Schedule A certification. As noted above, that determination, which specifies a validity period also triggers the employer's obligation to file its application or begin the recruitment required by the regulations. The regulation at 20 C.F.R. § 656.40(b) cited by counsel as supporting the terms of the collective bargaining agreement controlling the PWD, also provides in the lead sentence that "[t]he SWA determines the prevailing wage." Moreover, clarification on this issue is provided by the DOL. According to the DOL's Frequently Asked Questions (FAQs) found online at <http://www.foreignlaborcert.doleta.gov/faqs.cfm>, (Question 4 under Prevailing Wage) the following information is provided:

Must the employer request a prevailing wage from a State Workforce Agency (SWA) if a Collective Bargaining Agreement exists or the employer is choosing to use a Davis-Bacon Act or McNamara-O'Hara Service Contract Act Wage?

Yes, the employer must always request a prevailing wage from the SWA having jurisdiction over the proposed area of intended employment. The SWA is responsible for evaluating whether the wage source chosen by the employer is applicable and/or acceptable.

(Question 4 under Schedule A) provides:

Must the employer request a prevailing wage determination from the State Workforce Agency (SWA) if filing under Schedule A?

Yes, a prevailing wage determination must be requested from the SWA having jurisdiction over the proposed area of intended employment.

With respect to the SWA's PWD that counsel submitted, which set the prevailing wage rate at \$21.93, and not at \$21.70 as counsel asserts based on the collective bargaining agreement, this raises a question as to whether the SWA had an opportunity to review the collective bargaining agreement in this case, or if evaluated the source as not applicable in its determination. The AAO notes that the PWD listed that it used OES as its source in determining the wage. Based on the evidence submitted, the petitioner failed to submit a Form ETA 9089 which offered a wage that equaled or exceeded the wage based on the SWA determination of \$21.93 per hour.³

³ Further, it is noted that the five percent deviation from the prevailing wage rate that was permitted

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.

Although the petitioner's documentation included a copy of a notice of posting of a job opportunity that was posted on the petitioner's premises, this posting procedure does not comply with the regulatory requirement where there is a bargaining representative as is evidenced here by the existence of the collective bargaining agreement. As noted above, 20 C.F.R. § 656.10(d)(1)(i) only

under pre-PERM regulation is no longer acceptable.

requires evidence that notice of the job opportunity was provided to the bargaining representative, such as a copy of the letter and a copy of the application for employment certification that was sent to the bargaining representative. As referenced by the director, evidence of such a letter and copy of the application for employment certification which was sent to the bargaining representative is lacking in the record of proceedings. The petition is also denied on this basis.

Additionally, the ETA Form 9089, Part H, reflects that the beneficiary must have an associate's degree in nursing and 2 years of experience in nursing. The petitioner must demonstrate that the beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) and (B) provides that if the petition is for a skilled worker, the petition must be accompanied by evidence that the beneficiary meets the educational, training, or experience specified on the labor certification. Employment experience must be supported by letters from the relevant employers or trainers describing the training received or the experience acquired by the beneficiary. The record contains no evidence of the beneficiary's associate's degree or two years of nursing experience attained as of the priority date.

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.

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ORDER: The appeal is dismissed.