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Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: JAN 02 2009  
LIN 06 273 53280

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to  
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:

[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 Director (director), Nebraska Service Center, denied the preference visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a staffing company. The beneficiary is a registered nurse. The petitioner asserts that the beneficiary qualifies for Schedule A, Group I labor certification pursuant to 20 C.F.R. § 656.5(a). The director determined that the petitioner had not established that it had properly posted notice of filing an application for permanent employment certification, as the petitioner's notice listed a range of wages and the low-end of the range is less than the prevailing wage. The director also noted that the petitioner has not demonstrated that it is the intending employer offering the beneficiary a full-time, permanent position. Therefore, the director denied the petition.

The record shows that the appeal is properly filed and timely. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary. The first issue to be addressed in this case is whether the petitioner established that it properly posted notice of filing an application for permanent employment certification.

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.

On August 30, 2006, the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse. Aliens who will be permanently employed as registered nurses are identified on Schedule A as set forth at 20 C.F.R. § 656.5 as being aliens who hold occupations for which it has determined there are not sufficient U.S. workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of U.S. workers who are similarly employed.

An employer shall apply for a labor certification for a Schedule A occupation by filing an ETA Form 9089, Application for Permanent Employment Certification, in duplicate with the appropriate United States Citizenship and Immigration Services (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 AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.<sup>1</sup> On appeal, counsel submits a brief. The record contains a posting notice signed by [REDACTED] of the petitioner. The record does not contain any other documentation relevant to the issue of whether the petitioner properly posted notice of filing an application for permanent employment certification.

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

In applications filed under §§ 656.15 (Schedule A), 656.16 (Sheepherders), 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-

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<sup>1</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).

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.

The regulation at 20 C.F.R. § 656.10(d)(6) provides:

If an application is filed under the Schedule A procedures at § 656.15, or the procedures for shepherders at § 656.16, the notice must contain a description of the job and rate of pay, and must meet the requirements of this section.

As noted by the director in his decision, the record reflects that the petitioner is a full-service staffing and training organization with multiple client facilities. The record reflects that at the time the petition was filed, the petitioner had not selected a specific client facility where the beneficiary would be placed. In support of the petition, the petitioner included a notice of filing that contained a list of 15 work-site locations where the beneficiary may be placed. In addition, the petitioner submitted with the petition a prevailing wage determination (PWD) from the area of the petitioner's headquarters in Melville, New York. The (PWD) dated June 23, 2006 indicates a prevailing wage of \$23.26 per hour. The petitioner's notice of filing posted at its headquarters states: "Rate of Pay: \$19.19-29.71 per hour **\$23.26 At Company Headquarters** The employer will pay or exceed the prevailing wage, as determined by the U.S. Department of Labor." (Emphasis in original).

On appeal, counsel asserts that the petitioner's notice of posting included the range of all prevailing wages for all of the anticipated locations or clients at their healthcare facilities. Counsel states that since the petitioner's headquarters is located in Nassau-Suffolk, New York, the headquarters wage was used on all postings. He asserts that this method of listing wages "seems to be the appropriate way to post under the [Department of Labor (DOL)] regulations and [USCIS] guidance." Counsel asserts that the petitioner provided more information than is required by DOL regulations and USCIS guidance and, accordingly, the petitioner should not be punished for offering more information. Counsel further states that an error is purely technical in nature and would not prejudice any U.S. workers. On appeal, counsel submits no additional posting notices.

Section 212(p)(3) of the Act states that the wage to be paid shall be 100% of the prevailing wage determination. Pursuant to DOL guidance dated April 7, 2005, the petitioner "may advertise with a wage range as long as the bottom of the range is no less than the prevailing wage rate."<sup>2</sup> Pursuant to a USCIS memo entitled "Guidance for Schedule A Blanket Labor Certifications effective February 14, 2006," a copy of which was submitted by the petitioner with the petition, if the petitioner employs relevant workers at multiple locations and does not know where the Schedule A beneficiary will be placed, the petitioner must post the notice at the work sites of all of its locations or clients where relevant workers are currently placed.<sup>3</sup> The guidance indicates that the prevailing wage is to be derived from the area of the petitioner's headquarters.

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<sup>2</sup> [http://www.foreignlaborcert.doleta.gov/pdf/perm\\_faqs\\_4-6-05.pdf](http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_4-6-05.pdf) (accessed December 24, 2008).

<sup>3</sup> The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of U.S. workers similarly employed will not be adversely affected by the employment of

Counsel is correct that the prevailing wage to be posted is the prevailing wage derived from the area of the petitioner's headquarters in Melville, New York, which in the instant case is \$23.26 per hour. However, counsel is incorrect in his assertion that the petitioner provided more information than is required by DOL regulations and USCIS guidance and that the petition should therefore be approved. The petitioner may not post a wage that is lower than the prevailing wage, as it did in the instant case by posting a prevailing wage range at its headquarters of \$19.19-29.71 per hour.<sup>4</sup> Thus, the petitioner has not established that it properly posted notice of filing an application for permanent employment certification, as the petitioner's posting notice listed a range of wages and the low-end of the range is less than the prevailing wage. The petitioner must establish eligibility at the time the Form I-140 was filed. See 8 C.F.R. § 103.2(b)(12). Thus, this deficiency would not be overcome were the petitioner to publish notice of its application for employment certification at this date.

Further, the director noted in his decision that the petitioner has not demonstrated that it is the intending employer offering the beneficiary a full-time, permanent position. The petitioner did not address this issue on appeal. Therefore, the petitioner has not demonstrated that it is the intending employer offering the beneficiary a full-time, permanent position.

Beyond the decision of the director, the petitioner has not established its continuing ability to pay the proffered wage. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). The petitioner must demonstrate the continuing ability to pay the proffered

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aliens in Schedule A occupations. 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).

<sup>4</sup> While the petitioner indicated that it posted notices at 16 separate locations, the petitioner provided only one of its posting notices. Therefore, this office is unable to determine if the other 15 notices were properly posted.

wage beginning on the priority date. Given that the instant matter was accompanied by an application for Schedule A designation, the priority date for this petition is the date the ETA Form 9089 was properly filed with USCIS or August 30, 2006. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$23.26 per hour or \$48,380.80 annually.

With the petition, the petitioner submitted its audited financial statements for the years ending December 31, 2004 and 2003 as evidence of its ability to pay the proffered wage. However, the priority date in the instant case is August 30, 2006. Evidence preceding the priority date is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner's tax returns or audited financial statements for tax year 2005 should have been available at the time it filed the instant petition; however, financial evidence for 2005 or 2006 was not submitted.<sup>5</sup> Thus, the petitioner has not established its ability to pay the proffered wage.

Further, USCIS electronic records show that the petitioner has filed 317 other I-140 petitions. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending 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 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 MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). The record in the instant case contains no information about the proffered wage for the beneficiaries of those petitions, about the current immigration status of the beneficiaries, whether the beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. Furthermore, no information is provided about the current employment status of the beneficiaries, the date of any hiring and any current wages of the beneficiaries. Thus, the petitioner has not established its ability to pay the proffered wages to the beneficiaries of the other petitions or the proffered wage for the instant beneficiary.

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, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>5</sup> The regulation at 8 C.F.R. § 204.5(g)(2) states that "where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." The petitioner did not submit such a statement.