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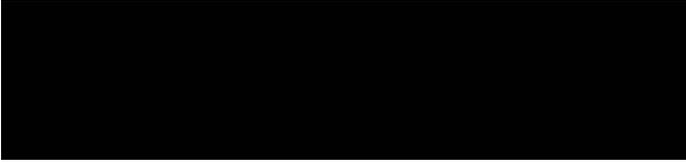
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS2090
Washington, DC 20529-2090



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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: JUN 01 2009
LIN 06 151 51087

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)

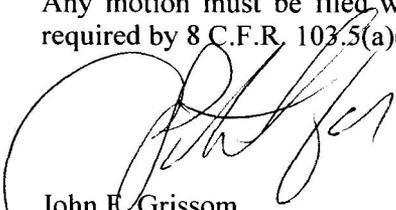
ON BEHALF OF PETITIONER:



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

The petitioner is a hospital. It seeks to employ the beneficiary permanently in the United States as 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 posted the notice of filing an application for permanent employment certification at less than the prevailing wage. 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 chronology of the filings and documentation in this matter are as follows: A Prevailing Wage Determination (PWD) was obtained by the petitioner from the Texas State Workforce Agency (SWA) with a determination date of February 16, 2006 stating *a prevailing wage determination of \$42,016.00 per year* for the offered job and submitted it with the petition to U.S. Citizenship and Immigration Services (USCIS); the petitioner posted notice of filing an application for permanent employment certification, listing the *offered wage of \$39,520.00*, beginning on February 23, 2006 through March 10, 2006; the petitioner filed a I-140 petition on April 17, 2006 with Form ETA 9089, listing a prevailing wage of \$42,016.00 and *an offered wage of \$39,520.00*, dated by the employer's representative on February 23, 2006; and thereafter, the director denied the petition on January 17, 2007 as the posting Notice stated less than the prevailing wage. The petitioner filed an appeal in this matter on February 20, 2007.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States. This section also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.

As a preface to the following discussion, new U.S. Department of Labor (DOL) labor certification regulations "PERM" became effective as of March 28, 2005. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). PERM applies to labor certification applications for the permanent employment of aliens filed on or after that date. 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. After March 28, 2005, the DOL Form ETA 750 was replaced by the

ETA Form 9089, Application for Permanent Employment Certification. As the I-140 was filed on April 17, 2006, PERM regulations apply to this case.

USCIS has the responsibility under regulation to review the blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. USCIS through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, and under PERM must investigate the facts in each case and determine if the material facts in the petition including the certification are true and correct. In this instance, the director conducts the review since in cases involving Schedule A occupations (i.e. registered nurse), USCIS is responsible to review compliance with applicable regulation. This process involves the investigation by USCIS of the petitioner's compliance with regulations promulgated under PERM as well as other relevant DOL regulations.

An employer seeking a labor certification for an occupation listed on Schedule A may apply for that labor certification under the regulation at 20 C.F.R. §656.5, as follows:

Schedule A

(a) Group I:

* * *

(2) Aliens who will be employed as professional nurses; and

- (i) Who have received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS);
- (ii) Who hold a permanent, full and unrestricted license to practice professional nursing¹ in the state of intended employment; or
- (iii) Who have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing.

Pursuant to 20 C.F.R. § 656.15(b), a Schedule A application shall include:

¹ Under the regulations, 20 C.F.R. § 656.5(a)(3)(i), "professional nurse" means a person who applies the art and science of nursing which reflects comprehension of principles derived from the physical, biological and behavioral sciences. Professional nursing generally includes making clinical judgments involving the observation, care and counsel of persons requiring nursing care; administering of medicines and treatments prescribed by the physician or dentist; and participation in the activities for the promotion of health and prevention of illness in others. A program of study for professional nurses generally includes theory and practice in clinical areas such as obstetrics, surgery, pediatrics, psychiatry, and medicine.

- 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 petitioner must demonstrate the continuing ability to pay the proffered 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 petition was properly filed with USCIS which in this instance is April 17, 2006. The regulation at 8 C.F.R. § 204.5(d) states:

Priority date. The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an individual labor certification from the Department of Labor shall be the date the request for certification was accepted for processing by any office within the employment service system of the Department of Labor. The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation within the Department of Labor's Labor Market Information Pilot Program shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with ... [USCIS].

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

Relevant evidence in the record includes the following: a U.S. Department of Labor, ETA Form 9089 dated by the employer's representative on February 23, 2006; a letter from the petitioner dated January 31, 2006 with the beneficiary's pay statements; a letter from [REDACTED] Administrative Assistant, Baylor Human Resources, dated January 31, 2006; a PWD obtained from the Texas Workforce Commission, Alien Labor Certification, with a determination dated February 16, 2006, for the job title registered nurse, skill level 1, stating a prevailing wage of \$42,016.00 per year; a certification of posting of the notice of filing an application for permanent employment certification of the position of registered nurse at the salary of \$19.00 per hour (\$39,520.00 per year) from the petitioner

² The submission of additional evidence on appeal is allowed by the instructions to the USCIS 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).

dated February 23, 2006, by H.R. Assistant;³ three web pages from the petitioner's Internet website (<<http://www.baylorhealth.com>>) accessed February 21, 2006 publishing the offered job in its in-house media as well as other documentation concerning the beneficiary's qualifications.

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

In applications filed under §§ 656.15 (Schedule A), 656.16 . . . 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...
- (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include locations in the immediate vicinity of the wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a). In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print that was used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

According to the regulation at 20 C.F.R. § 656.10(d)(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;

³ It was posted on February 23, 2006 and its removal date was indicated as March 10, 2006.

- iii. Provide the address of the appropriate Certifying Officer; and
- iv. Be provided between 30 and 180 days before filing the application.

The regulation at 20 C.F.R. § 656.15 states that applications for labor certification for Schedule A Occupations require the following:

- (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 Sec. 656.40 and Sec. 656.41.⁴

⁴ The regulation at 20 C.F.R. § 656.40 states in pertinent 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. Unless the employer chooses to appeal the SWA's prevailing wage determination under Sec. 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with an ETA application processing center and maintains the SWA PWD in its files. The determination shall be submitted to an ETA application processing center in the event it is requested in the course of an audit.

The regulation at 20 C.F.R. § 656.41 states in pertinent part:

(a) Review of SWA prevailing wage determinations. Any employer desiring review of a SWA PWD must make a request for such review within 30 days of the date from when the PWD was issued by the SWA. The request for review must be sent to the SWA that issued the PWD within 30 days of the date of the PWD; clearly identify the PWD from which review is sought; set forth the particular grounds for the request; and include all the materials pertaining to the PWD submitted to the SWA up to the date of the PWD received from the SWA.

The regulation at 20 C.F.R. § 656.10(d)(6) states in pertinent part:

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

The petitioner obtained the PWD from the Texas State Workforce Agency (SWA) on February 16, 2006 stating a prevailing wage of \$42,016.00 per year for the offered job. The petitioner posted the notice of filing an application for permanent employment certification at the salary of \$19.00 per hour (\$39,520.00 per year). As the notice was posted for less than the PWD listed rate, the notice was deficient and the director denied the petition.

Counsel submits on appeal an explanatory letter dated February 20, 2007, and another earlier PWD obtained from the Texas Workforce Commission, Alien Labor Certification, with a determination date of May 12, 2005 for the Methodist Health System for a registered nurse position in Dallas, Texas, at the prevailing wage rate of \$39,520.00 (the Methodist Health System's PWD). Counsel asserts the Methodist Health System's PWD establishes the prevailing wage in this case.

The Methodist Health System is not the employer or petitioner in this matter. The regulation at 20 C.F.R. § 656.40 refers to "the employer must request a prevailing wage determination." Accordingly, the Methodist Health System's PWD is not admissible or probative in this matter.

On appeal in his explanatory letter dated February 20, 2007, counsel also asserts that "in reality, the wage offered actually exceeds the prevailing wage" based upon the other PWD.

Counsel has submitted other explanatory letters on appeal dated April 28, 2007 and October 17, 2007. With the earlier letter, counsel submits a PWD (the third PWD) issued to the petitioner by the Texas Workforce Commission, Alien Labor Certification, with a determination date of September 8, 2006 for a registered nurse position in Dallas, Texas, at the prevailing wage rate of \$31,283.00. This PWD was obtained after the priority date and, therefore, would not have been valid at the time of filing. The notice of filing listed a different rate of pay as well, and therefore would not be accepted.

With the October 17, 2007 letter counsel submits into evidence a fourth PWD from the Texas State Workforce Agency (SWA) to the petitioner with a determination date of September 23, 2005 stating a prevailing wage of \$38,438.00 per year. Counsel similarly asserts this PWD should be used and can support the petition. This PWD appears to be for a different employing entity as it lists a different name, and different address than the petitioner's address.⁵ Additionally, the Form ETA 9089 and the notice of filing both contain a different rate of pay than this PWD.

⁵ The term employer is defined in 20 C.F.R. 656.17: "The term "employer" means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3." If Baylor Medical Center at Irving has a different FEIN than the petitioner, it would be a different employer.

As noted above, regulations require that the offered job be posted and notice given according to the wage stated in the PWD. We find that the notice of filing an application for permanent employment certification was posted at less than the prevailing wage. The petitioner cannot submit subsequently obtained PWDs for other entities on appeal to overcome the deficiencies. 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).

Further, although not raised in the director's denial, we find that the petitioner also failed document the petitioner's 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*, 229 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 at 8 C.F.R. §204.5(b)(3)(g)(2) concerning initial evidence of the ability to pay 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. 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.

The petitioner failed to submit sufficient evidence of its ability to pay the proffered wage according to the regulation, therefore the petitioner has failed to demonstrate that it has the continuing ability to pay the proffered wage beginning on the priority date.⁶

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.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

⁶ The petitioner submitted one pay statement on the beneficiary's behalf which showed the beneficiary's hourly rate but it would not establish the petitioner's ability to pay the full proffered wage from the time of the priority date onward.



ORDER: The appeal is dismissed.