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



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
EAC 06 119 51047

OFFICE: VERMONT SERVICE CENTER

Date: JUN 22 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:

[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. Brisson
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 medical healthcare and research facility. 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.

On March 9, 2006, the petitioner initially submitted the I-140 petition with a Form ETA 750, Application for Alien Employment Certification. In response to the director's request for evidence and as required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089 or labor certification) was provided.

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 March 9, 2006, or almost one year after PERM became effective.

On August 30, 2006, the director denied the petition based on the petitioner's failure to file the Immigrant Petition for Alien Worker (Form I-140) within the validity period of the required prevailing wage determination (PWD) entered by the State Workforce Agency (SWA) having jurisdiction over the proposed area of intended employment. The director also denied the petition because the petitioner failed to comply with the Department of Labor (DOL)'s posting and notification requirements.

On appeal, the petitioner, through counsel, maintains that the director should exercise discretion and recognize *nunc pro tunc*¹ the documentation submitted in response to the director's May 18, 2006 request for evidence as fulfilling the regulatory requirements. On this basis, counsel asserts that the petition should be approved.²

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

¹ Meaning "now for then" or a phrase applied to acts allowed to be done with a retroactive effect. *See Black's Law Dictionary*, 553 (Abridged 5th ed. 1983).

² 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.

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.

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 March 9, 2006.

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.)

Based on the new PERM regulations, the posting requirement changed as of March 28, 2005 from 10 consecutive days, to the required 10 consecutive business days.

The SWA prevailing wage determination submitted by the petitioner specified a validity period running from July 14, 2006 to June 30, 2007. As required by the regulation at 20 C.F.R. § 656.40(C), the petitioner failed to file the I-140 within this validity period. As noted above, it was filed on March 9, 2006. As the petitioner obtained the PWD after filing its petition, it failed to comply with 20 C.F.R. § 656.40(c).

Additionally, with respect to the PWD, the SWA listed a skill level of two (based on four wage levels). It is unclear what requirements the petitioner listed when it obtained the wage. Had the petitioner listed 13 years of experience it required along with an Associate degree (as listed on Form ETA 750), this level of education would likely have resulted in a level four wage assessment.

The notice of posting submitted indicated that it was posted from July 10, 2006 to July 21, 2006. As provided in 20 C.F.R. § 656.10(d)(3), the notice of filing must be provided between 30 and 180 days before filing the application. As the application in this case was filed on March 9, 2006, the notice of filing did not comply with the regulatory requirements because it was posted after the petitioner filed. Clarification on this topic is contained on DOL's online database of Frequently Asked Questions and Answers (FAQS) found at <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm>. (Question 2 under Notice of Filing).

Additionally, the record failed to establish whether the petitioner published the notice in any and all in-house media, whether electronic or printed according to the normal procedures used for the recruitment of similar positions in the employer's organization. *See* 20 C.F.R. § 656.10(d)(ii).³

Finally, this notice failed to indicate exactly where it was posted and misrepresented the employment experience requirements set forth in the ETA Form 9089. On Part H, 10, 10-A and 10-B of the ETA Form 9089, it indicates that experience in an alternate occupation of Assistant Nurse or Staff Nurse is acceptable. The number of *months* of experience is specified as 13.⁴ Further, while Part H, 6 states that experience in the job offered of register nurse is required, no designation of the number of months is stated on Part H, 6-A. On the notice of posting, the amount of work experience is described as 13 *years* as a registered nurse, assistant nurse or staff nurse.⁵ It is not described as an alternate occupation of Assistant Nurse or Staff Nurse as set forth on the ETA Form 9089.

Additionally, the evidence provided does not demonstrate the petitioner's continuing financial ability to pay the proffered wage of \$63,232 per year 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 the United States Citizenship and Immigration Services [USCIS].

The ability to pay a proffered wage may also be established if a petitioner has employed a beneficiary during a given period. If the payment of compensation equals or exceeds the proffered

³ Further, the record failed to establish whether bargaining representation for the workers was present in this company so as affirm whether the bargaining representative was notified consistent with the provisions of 20 C.F.R. § 656.10(d)(i). It is noted that Part e of the ETA Form 9089 relating to bargaining unit notification was not completed as instructed.

⁴ Additionally, 13 months of experience would conflict with the requirements on Form ETA 750 initially submitted as 13 years.

⁵ This notice did not accurately describe the job as set forth on the ETA Form 9089 and did not comply with the regulation at 20 C.F.R. § 656.10(d)(6) which provides that under Schedule A procedures the notice must contain a description of the job and rate of pay, and must meet the requirements of the section.

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)⁶ as reflected on the petitioner's federal income tax returns, 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 during the relevant period of time.

In this case, although the evidence indicates that the beneficiary has worked for the petitioner, no documentation of compensation paid has been submitted. No other submissions relating to the financial status of the petitioner consistent with requirements of the regulation at 8 C.F.R. § 204.5(g)(2) have been provided. Therefore the petitioner has not demonstrated its continuing financial ability to pay the proffered wage.

Additionally, as mentioned above, the ETA Form 9089 indicates that experience is required in the job offered but fails to quantify the amount of experience. It only indicates that 13 months in an alternate occupation of assistant nurse or staff nurse would be acceptable. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Other than a letter dated February 16, 2006, from [REDACTED], the petitioner's human resources director, indicating that the beneficiary had been employed by the petitioner since January 2006, there is no other corroboration of any employment experience gained by the beneficiary (whether 13 years or 13 months) consistent with regulatory requirements.⁷ Going on record without

⁶ 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. A corporate petitioner's year-end current assets and current liabilities may be shown on Schedule L of its federal tax returns. Current assets are listed 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.

⁷ The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). With respect to documentation of training or experience, the regulation at 8 C.F.R. § 204.5(l)(3) also provides:

(ii) *Other documentation—*

- (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a

supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As discussed above, the AAO concurs with the director's determination that the petitioner failed to comply with DOL's posting and notification requirements. The additional deficiencies noted above are each considered to be an independent and alternative basis for denial of the petition.

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).

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.

description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.