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



U.S. Citizenship  
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Services

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FILE: [REDACTED]  
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Office: NEBRASKA SERVICE CENTER

Date **MAY 15 2009**

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:

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, 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 medical center. 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 had not established that it had properly notified the collective bargaining unit with regard to the prevailing wage, and, therefore, failed to provide the proper notice of filing. The director stated the notice of filing indicated a pay range of \$25.00 to \$30.00, while the prevailing wage determination submitted with the I-140 petition indicated the prevailing wage for the occupation in the area indicated is based on the union wage of \$28.04 per hour. The director denied the petition accordingly.

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.

As set forth in the director's December 5, 2006 denial, the issue in this case is whether the petitioner notified the collective bargaining unit as to the correct prevailing wage.

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.

On April 17, 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 been determined that 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 U.S. 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 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 ETA Form 9089 was properly filed with USCIS on April 17, 2006. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$28.04 an hour or \$58,323.20 annually.

The AAO takes a *de novo* look at issues raised in the denial of the petition. *See 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> Relevant evidence submitted on appeal includes the I-290B and a statement from counsel. On the I-290B, counsel states the director's denial is in error as it misread the Notice of Filing for a Schedule A Nurse petition for a unionized hospital. Counsel asserts that the Notice of Filing submitted to the bargaining unit contained the complete range of wages offered under the collective bargaining agreement to the nurse's union including some nurse with lower qualifications than the beneficiary. Counsel then notes that the prevailing wage determination, in contrast, listed the actual wage offered to the beneficiary pursuant to the collective bargaining agreement, which happened to be higher than the lowest wage offered in the collective bargaining agreement. Counsel notes that even if the notification was incorrect in listing the wage at the bottom of the collective bargaining agreement, the incorrect wage was a harmless error, since it was provided to the collective bargaining representative, who is very familiar with the terms of the bargaining agreement and what wage, the beneficiary, a member of the collective bargaining unit, was receiving.

In his additional statement, counsel notes that the petitioner is a unionized hospital, and that the collective bargaining agreement between the hospital and the nurses bargaining unit provides a matrix of required wages from as low as \$25 per hour to as high as \$30 an hour, to be paid to entry-level nurses, based on their credentials and prior experience. Counsel states that this range of wages is for the position, while the Pennsylvania Job Center provides a wage for a particular nurse, and not for the position. Counsel states that because the beneficiary's qualifications exceeded the bottom of the collective bargaining unit, the beneficiary's wage was in the middle of the prevailing wage range.

Counsel notes that the denial of the instant petition was particularly incongruous, as USCIS has approved similar petitions with posting notices stating the \$25 to \$30 per hour wages, with entry-level prevailing wage determination of \$28.04. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Again, counsel reiterates that if the notice of filing was incorrect in listing the wage at the lower end of the collective bargaining agreement, this incorrect wage was a harmless error.

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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).

Counsel states that the Department of Labor does not regard the Notice of Filing as providing U.S. workers with an opportunity to compete for the position, but rather, the DOL has stated, "In our view, Congress' primary purpose in promulgating the notice requirement was to provide a way for interested parties to submit documentary evidence bearing on the application for certification rather than to provide another way to recruit for U.S. workers." Counsel cites 69 Fed. Reg. 77325, 77338 (December 27, 2004). The record contains a copy of the petitioner's document, "Notice of Filing Pursuant to 20 C.F.R. § 656.10(D)(i)(ii)." This document lists the job title as registered nurse and states there are multiple openings. The salary is identified as \$25 to \$30 an hour. At the bottom of the document, is stated "I certify that a copy of this notice was given to the collective bargaining representative on March 2, 2006." [REDACTED] Associate Hospital Director, Human Resources signed the document. The record also contains a copy of a prevailing wage determination from the Pennsylvania Department of Labor and Industry, Harrisburg, Pennsylvania obtained and dated March 8, 2006, after submitting the notice to the collective bargaining representative. This document identifies the beneficiary and states that the prevailing union and employer wage is \$28.04 an hour. As stated previously, the ETA Form 9089 identifies the offered wage as \$28.04 an hour.

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 (Shepherders), . . . 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-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.

(Emphasis added.)

The AAO notes that the petitioner's notice of filing refers to 20 C.F.R. § 656.10(d)(1)(ii) which refers to petitioners with no collective bargaining representative. If the petitioner is unionized, the regulatory guidance at 20 C.F.R. § 656.10(d)(1)(i) is dispositive. Based on the statement at the bottom of the petitioner's notice of filing, the petitioner appears to have provided a notice of filing to the collective bargaining representative.

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

On appeal counsel states that the discrepancy between the salary range listed on the notice of filing and the prevailing wage listed on the ETA Form 9089 is harmless error, and that the petitioner's collective bargaining agreement lists the range of salaries noted on the petitioner's Notice of Filing. However, counsel does not provide any further evidentiary documentation, such as relevant excerpts from the collective bargaining agreement, to further substantiate his assertions. Going on record without 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)). The petitioner must provide evidence to support its assertion. *See* 20 C.F.R. § 656.15.

Employers can use a wage range in the required notice. It is longstanding DOL policy that the employer may offer a wage range as long as the bottom of the range is no less than the prevailing rate. *See* 69 Fed. Reg. 77338 (Dec. 27, 2004), citing page 114 of *Technical Assistance Guide No. 656 Labor Certifications (TAG)*. Here, however, the bottom range of the wage on the notice of filing was lower than the proffered/prevaling wage and accordingly is in error. Consequently, the petitioner failed to meet the standard set forth in 20 C.F.R. § 656.10.

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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.