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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



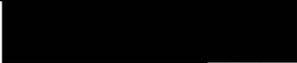
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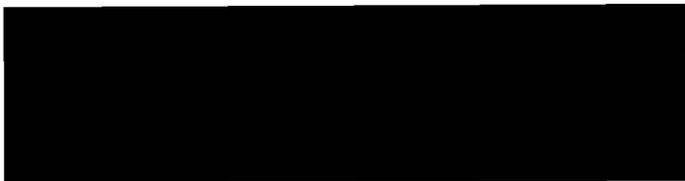
Petitioner:



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, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner operates a hospital, and seeks to employ the beneficiary permanently in the United States as a registered nurse, a professional or skilled worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(2), and 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 nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(3)(ii).

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the Department of Labor (DOL) has determined that there are not sufficient United States 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 United States workers similarly employed.

Based on 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file Form I-140, “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.”¹ 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 [U.S. Citizenship and Immigration Services (USCIS)].” 8 C.F.R. § 204.5(d).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer’s completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer’s employees as set forth in 20 C.F.R. § 656.10(d).

¹ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

Also, according to 20 C.F.R. § 656.15(c)(2), aliens who will be permanently employed as professional nurses must have: (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination; or (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment; or (3) show that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

On May 21, 2007, the director denied the petition because the petitioner failed to submit a proper prevailing wage determination in that it was not submitted to collective bargaining as the petitioner indicated was necessary on the ETA Form 9089. Additionally, the director denied the petition because the petitioner failed to provide proper notice of the position in accordance with 20 C.F.R. § 656.10(d).

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The record shows that the appeal is properly filed, timely and makes an allegation of error in law or fact. 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.

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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. 1988).

The director found that, as the petitioner indicated it was subject to a collective bargaining agreement on page 5 of the ETA Form 9089, Section E, Question 24, and the wage did not state this, that the petitioner failed to obtain a prevailing wage determination (PWD) in compliance with 20 C.F.R. § 656.40 from the relevant State Workforce Agency (SWA) prior to filing. On appeal, counsel asserts that the prevailing wage request is not subject to union agreement so that the SWA was not precluded from issuing a prevailing wage determination for the position. In addition, counsel asserts that proper notice was given to the bargaining representative, because the representative was aware that the amount reflected on the submitted paperwork would increase with negotiated across the board salary increases (raising the amount that the beneficiary would receive to an amount at or higher than the prevailing wage).

The regulation at 20 C.F.R. §§ 656.40 and 656.41 specifically sets forth that the petitioner must request a wage and the wage obtained is assigned a validity period. 20 C.F.R. § 656.40(b)(1) states that “if the job opportunity is covered by a collective bargaining agreement (CBA) that was

² 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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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. similarly employed, that is, it is considered the 'prevailing wage' for labor certification purposes." On the Form ETA 9089, Part I, Section e, Question 24, the petitioner indicated that "the bargaining representative for workers in the occupation in which the alien will be employed [has] been provided with notice of this filing ...". The petitioner submitted no bargaining agreement with the initial submission or in response to the director's November 29, 2006 Request for Evidence ("RFE"). On appeal, counsel submitted a declaration from [REDACTED] the collective bargaining representative, stating that the rate negotiated increased each nurse's base salary, but did not set any sort of base salary amount. Counsel submitted an additional declaration from [REDACTED] the petitioner's human resources representative, which states that "no negotiated wage amount [has been] reached between the bargaining parties for the position of Registered Nurse" even though the petitioner and the California Nurses Association have "an existing Collective Bargaining Agreement." The declaration indicates, however, that "what was bargained for and reached by the parties was an across the board wage raise for Registered Nurses and not a fixed hourly rate." Question 24, when read literally and without imposing underlying meaning, only asks whether a collective bargaining representative exists, not whether a collective bargaining agreement exists. As [REDACTED] is the collective bargaining representative, the petitioner was required to check the "yes" box in response to Part I, Section e, Question 24. Her declaration is sufficient to demonstrate that no collective bargaining agreement governs the prevailing wage determination so that the prevailing wage determination made by the SWA was appropriate in this case.³

The prevailing wage determination, issued on May 5, 2006 for a level 2 nurse manager, states that the prevailing wage is \$28.78 per hour, requires an associate's degree in nursing and a California registered nursing license, and two years experience accepted in lieu of a bachelor's degree in nursing with no experience required. The job description states that the employee would be responsible for:

Administer[ing] prescribed medications and treatments. Prepar[ing] equipment and aid[ing] physicians during examination and treatments. Observ[ing] patients, record[ing] significant conditions and reaction and notif[y]ing supervisor of patients' condition and reaction to drugs, treatments and incidents. Tak[ing] temperature, pulse, blood pressure and other vital signs of patient to detect abnormalities and assess conditions. IV insertion, pain management, post op wound care and CPR. Rotat[ing] among various clinical services at the medical center.

Although the prevailing wage determination reflects the correct prevailing wage of \$28.78, which is listed on the ETA Form 9089, the petitioner failed to provide proper notice of the position, including the correct prevailing wage, to the collective bargaining representative. One of the requirements to

³ The prevailing wage determination submitted on appeal, while not applicable to the present petition, indicates in the State Wage Agency determination Section that "CBA [is considered] only for wage increase; Org used OES L1 [level one] for entry RN."

meet Schedule A eligibility is that the petitioner is required to post the position in accordance with 20 C.F.R. § 656.10(d), which provides:

- (1) In applications filed under § 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.
 - ...
- (3) The notice of the filing of an Application for Permanent Employment Certification must:
 - (i) State that 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.
- (6) If an application is filed under the Schedule A procedures at § 656.15 . . . the notice must contain a description of the job and rate of pay and meet the requirements of this section.

Additionally, section 212 (a)(5)(A)(i) of the Act states the following:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified . . . that

- (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

Fundamental to these provisions is the need to ensure that there are no qualified U.S. workers available for the position prior to filing. The required posting notice seeks to allow any person with evidence related to the application to notify the appropriate DOL officer prior to petition filing. *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).

To be eligible for a Schedule A petition, as set forth above the petitioner would need to have provided notice to the bargaining representative pursuant to 20 C.F.R. § 656.10(d)(1)(i) that included the correct rate of pay. The petitioner presented evidence that it both provided notice to the collective bargaining representative and also posted the job notice in a common area for the employer's employees under the provisions of 20 C.F.R. § 656.10(d)(1)(ii). Neither the notice provided to the collective bargaining representative nor the notice provided to the petitioner's employees contains the correct rate of pay, but instead states that the rate of pay will be \$26.95 per hour. The prevailing wage determination and the amount listed on the ETA Form 9089 states that the hourly wage is \$28.78. 20 C.F.R. § 656.10(d)(6) requires that the notice contains the correct rate of pay, which the petitioner's notice did not include.⁴

On appeal, counsel argues that the labor representative knew that the \$26.95 rate was incorrect because a rate increase had been previously bargained for. Counsel cites to the declaration by ██████████ to prove that she, as the labor representative, was aware of the forthcoming rate increase. The declaration states that an increase had been negotiated, however, the declaration makes no statement as to whether this rate increase would effect the beneficiary's salary. As no evidence was presented that the collective bargaining representative was given notice including the correct prevailing wage, we are unable to conclude that notice was proper and the petition should be approved. Additionally, as set forth in footnote 4, the posting notice had other defects and was insufficient to meet the terms of 20 C.F.R. § 656.10(d).

⁴ Additionally, we note that the notices fail to accurately state the position requirements. The position as stated on the ETA Form 9089 requires an associate's degree in nursing or a nursing diploma and two years of relevant work experience. Part H, Block 14 of the Form 9089 also requires a specific set of skills to be required for the position: [e]xperience with IV insertion, pain management, post op wound care and CPR." The posting of the job is required to contain a description of the job and accurately describe the position requirements. *See* 20 C.F.R. § 656.10(d)(6). In addition to lacking the correct wage, the job posting does not address the required two years of experience or include the specific skill set specified on the Form 9089.

Counsel also argues that as the SWA approved another wage determination for a nurse at the hourly rate of \$26.69 only days before the beneficiary's wage determination was approved, the \$26.95 on the bargaining representative's notice was allowable. The prevailing wage submitted on appeal shows a "Level 1" wage for what appears the SWA determined to be a registered nurse position in Orange County, California and requires a different experience level.⁵ The wage initially submitted was assessed as a "Level 2" wage for a nurse in Los Angeles County, California. 20 C.F.R. § 656.41 allows the petitioner to appeal a wage determined in error. The petitioner did not do so here. As the two prevailing wage determinations were based on different experience requirements for different positions correctly or incorrectly determined based on different counties, the prevailing wage determinations cannot be interchanged. The petitioner cannot substitute the alternate prevailing wage determination on appeal. Therefore, the petitioner may only rely on the wage initially submitted and the notice of filing does not meet the notice requirements of 20 C.F.R. 656.10(d).

The petitioner failed to meet the notice requirements as set forth in 20 C.F.R. § 656.10(d) and therefore this petition may not be approved. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

⁵ The DOL Online Wage Library previously assigned two levels of wages. As part of the Consolidated Appropriations Act of 2005 passed by Congress and signed into law on December 8, 2004, Section 423 amends Section 212(p) of the INA to require that the employer offer 100% of the prevailing wage determined and disallows the prior 95% of pay rule. Further, the amendment provided that where the Secretary of Labor uses or makes available to employers a governmental survey to determine the prevailing wage, the salary shall provide at least four levels of wages commensurate with experience, education, and level of supervision.