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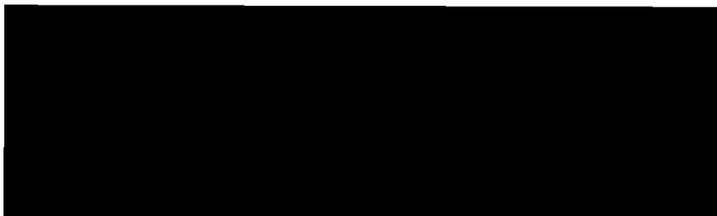
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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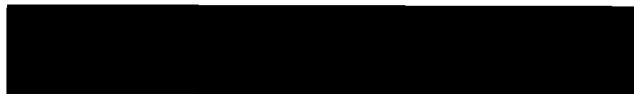


File: [Redacted]
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Office: NEBRASKA SERVICE CENTER

Date: **APR 23 2010**

In re: 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 and affirmed his decision on a subsequent motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a religious nonprofit medical center which seeks to employ the beneficiary permanently in the United States as a registered nurse pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). The petition contains a blanket labor certification application 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 U.S. 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.

Pursuant to 8 C.F.R. § 204.5(a)(2) and (3), an applicant for a Schedule A position must file a Form I-140, Immigrant Petition for Alien Worker, "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 and by any other required supporting documentation." The priority date of the petition is the date the petition 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 an ETA Form 9089, Application for Permanent Employment Certification, and evidence that the employer has provided appropriate notice of filing the labor certification (Posting) to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d). The petitioner must also obtain a prevailing wage determination (PWD) in compliance with 20 C.F.R. § 656.40. Also, pursuant to 20 C.F.R. § 656.15(c)(2), aliens who will be permanently employed as professional nurses must have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, hold a full and unrestricted license to practice professional nursing in the state of intended employment, or have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

The instant petition, which includes both the Form I-140 petition and an ETA Form 9089 application, was filed with USCIS on October 27, 2006. The petitioner proposes to have the beneficiary work 36 hours per week and pay her \$25.80 per hour (\$928.80 per week). The ETA Form 9089 indicates that the prevailing wage at the time of filing the application is \$24.05 per hour and the offered wage \$25.80 per hour. The petition is accompanied by a PWD for the petitioner from the State of California Employment Development Department (EDD), valid from October 19, 2006 to July 1, 2007, indicating that the prevailing wage is \$24.05 per hour. However, the petitioner also submitted a Posting which was posted at the petitioner's place of business from June 1, 2006 to July 14, 2006. The Posting states that the rate of pay for the proffered position is \$23.63 – \$31.43 per hour. As further explained below, the lowest hourly rate listed in the Posting is lower than the

prevailing wage listed in both the PWD dated October 19, 2006 and the ETA Form 9089; however, for Schedule A occupations, the petitioner complied with all relevant regulatory criteria and program policies.

On September 10, 2007, the director denied the petition on the basis that the Posting included a rate of pay that was lower than the PWD for the occupation indicated on the ETA Form 9089. Accordingly, the director concluded that the petition was not accompanied by a proper application for labor certification. Following the denial, counsel for the petitioner filed a motion to reopen and reconsider on October 10, 2007. Counsel contended in his motion that the director had used the wrong rate of pay. Counsel stated that, at the time the job was posted in June 2006, the prevailing wage rate was \$23.63 per hour and thus the Posting included the correct prevailing wage rate and the proffered wage at that time because of the pay range provided on the Posting. The director incorrectly believed the prevailing wage rate to be \$24.05 per hour at the time the Posting was posted at the petitioner's facility. Submitted as evidence of the correctness of the \$23.63 prevailing wage rate listed in the Posting were: (1) a photocopy of a prevailing wage rate for a level 1 registered nurse in Riverside/San Bernardino, California according to the DOL's Foreign Labor Certification Online Wage Library and Data Center identifying the wage as \$23.63 per hour (valid from January 2006 through June 2006); and (2) a photocopy of a PWD issued on March 20, 2006 by the State of California EDD for another employer and registered nurse both unrelated to the instant petition but for a registered nurse position also located in San Bernardino County, California. Both documents show that the lowest prevailing wage rate for a registered nurse in San Bernardino, California, at the time the Posting was posted in June 2006 was \$23.63 per hour.

On November 15, 2007, the director affirmed his original decision stating that since the petitioner had received the PWD with the higher prevailing wage (\$24.05), a new Posting should have been posted to rectify the difference. The petitioner appealed and the matter is now before the AAO.

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).¹

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.

¹ 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).

On appeal, counsel for the petitioner renews his assertions stating that the director has used an incorrect PWD and that the petitioner has fully complied with the posting requirement as prescribed by the relevant regulations.

The record of proceeding contains printouts of the prevailing wage rate for a registered nurse in Riverside/San Bernardino, California for periods January 2006 – June 2006 and for July 2006 – June 2007.² The lowest prevailing wage rates according to these printouts are \$23.63 per hour for June 2006 and \$24.05 per hour thereafter. The record also contains the petitioner's Posting listing \$23.63 – \$31.43 per hour as the rate of pay. The record reflects that this Posting was posted at the petitioner's [REDACTED] from June 1, 2006 to July 14, 2006. The job, according to the Posting, will be performed at the petitioner's medical facility, at [REDACTED]. Counsel also submits a photocopy of a PWD that he has previously obtained for an unrelated employer and beneficiary for a registered nurse position in San Bernardino County, California, the same county as the petitioner in this case. The PWD for that other beneficiary/petitioner is \$23.63 per hour.

One of the requirements to 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), . . . 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:

. . .

- (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 . . . In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal

² These printouts are from <http://www.flcdatcenter.com>.

³ It is noted that, although the address of the employment opportunity and the location of the Posting differ, it appears that both places are within the Loma Linda University Medical Center. Due to the size of the facility, it is more likely than not that the Posting complies with the regulations by being posted in a place where the employer's U.S. workers can readily read the Posting on their way to and from their place of employment. 20 C.F.R. § 656.10(d)(1)(ii); *see also* <http://www.llu.edu/map/> (accessed April 13, 2010).

procedures used for the recruitment of similar positions in the employer's organization.

...

- (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.

...

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

Another requirement to meet Schedule A eligibility is for the petitioner to submit a PWD "in accordance with [20 C.F.R.] § 656.40 and § 656.41" along with the petition and the completed ETA Form 9089. 20 C.F.R. § 656.15(a)(1). The regulation at 20 C.F.R. § 656.40(c) states that a Schedule A application must be filed within the validity period of this PWD.

In this case, the AAO observes that the Posting was posted for more than 10 days, from June 1, 2006 to July 14, 2006, and it contains all the information as prescribed by the relevant regulations. The location where the Posting was posted complies with the regulations, and the Posting was concluded on July 14, 2006, 105 days before filing the petition. Moreover, the AAO concludes that this Posting contained a "rate of pay" which was correct at the time of the Posting, i.e., June 2006. Although the petitioner did not request a PWD specific to this petition to support the rate of pay listed on the Posting, the regulations do not require employers to take this step. *Compare with* 20 C.F.R. § 656.10(d)(4) (requiring non-Schedule A posting notices to include a rate of pay equaling or exceeding a PWD, which would already have been received from a state workforce agency). The regulation at 20 C.F.R. § 656.10(d)(6) only requires that the notice contain a job description and rate of pay.⁴

⁴ 20 C.F.R. § 656.10(d)(4), (6) provides:

- (4) If an application is filed under Sec. 656.17, the notice must contain the information required for advertisements by Sec. 656.17(f), must state the rate of pay (which must equal or exceed the prevailing wage

In this matter, the petitioner used a previously obtained PWD for an unrelated petition, and publicly available information from the DOL's Labor Certification Online Wage Library and Data Center, to ascertain the appropriate rate of pay for the Posting. Although this may not be the preferred method of identifying the appropriate rate of pay to be placed on a Schedule A posting notice, in this matter the offered rate range in the notice, \$23.63-\$31.43, was more likely than not correct in June 2006. Therefore, the AAO concludes that the petitioner properly posted the Posting as prescribed by the regulations mentioned above.

However, properly posting the Posting in and of itself will not necessarily lead to approval of the petition. In order for the petition to be approved, the petitioner must submit with the petition a PWD that fully complies with the requirements of 20 C.F.R. § 656.40. *See also* 20 C.F.R. § 656.15(b)(1). The regulation at 20 C.F.R. § 656.40(c) specifically states that a Schedule A application must be filed within the validity period of the PWD. As noted above, this is in contrast to the regulatory guidance for non-Schedule A labor certifications, which requires the PWD to be valid during the *recruitment* period for the offered position. *Id.* Since Schedule A occupations are designated by the DOL as shortage occupations, no recruitment is conducted as part of the Schedule A application process. *See* 69 Fed. Reg. 77326, 77338 (Dec. 27, 2004) (noting that the primary purpose of the posting requirement is "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").

Therefore, the posting requirement for Schedule A occupations, though necessary, is not a recruitment step, and the rate of pay on the notice does not have to exactly match the wage listed on the PWD submitted with the petition. Furthermore, as explained above, the Posting must have contained a rate of pay for the employment opportunity which was equal to or greater than the prevailing wage at the time of the Posting. If this requirement is not met, then it cannot be concluded that the Posting actually listed the "rate of pay" for the job in question. 20 C.F.R. § 656.10(d)(6).

In the instant matter, the hourly wage range expressed in the notice was \$23.63-\$31.43. The PWD (obtained over three months later on October 19, 2006) reflected an increase in the hourly wage to \$24.05. The proffered wage was \$25.80 per hour. The PWD was still valid on October 27, 2006, when the petition was filed. As the proffered wage exceeds the PWD rate of pay, and the Posting

entered by the SWA on the prevailing wage request form), and must contain the information required by paragraph (d)(3) of this section.

...

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

more likely than not contained a rate of pay reflective of the prevailing wage at the time of the Posting, the petition meets the regulatory requirements.

Accordingly, based on the foregoing, the petitioner has overcome the reasons for the petition's 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 been met.

ORDER: The appeal is sustained. The petition is approved.