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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
and Immigration
Services

[Redacted]

B6

FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: DEC 02 2010

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

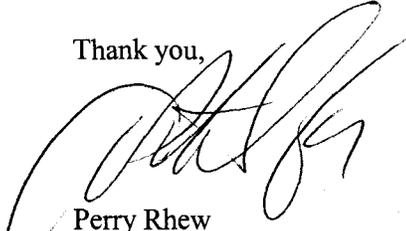
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 [United States Citizenship and Immigration Services (USCIS)].” 8 C.F.R. § 204.5(d). Here, the Form I-140 petition was filed on October 20, 2006.

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

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).

to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d). 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) that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

On November 16, 2007, the director denied the petition because the notice of filing of an Application for Permanent Employment Certification did not state a specific rate of pay for the position as required by 20 C.F.R. § 656.10(d)(6).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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.

On appeal, counsel states that it presented the petitioner with two sample notices of job availability for posting at the petitioner's offices, one of which contained a space for the prevailing wage rate, and one which did not. Counsel states that the petitioner signed both copies and returned both notices to its counsel. When filing the Form I-140 and supporting documentation, counsel states that he inadvertently included the job notice which did not contain the stated pay rate. On appeal, counsel provided copies of both notices. Counsel states that submitting a notice which did not specifically state the rate of pay should be considered harmless error when the notice submitted stated that the employer would pay or exceed the prevailing wage as determined by the U.S. Department of Labor.

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).

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), § 656.16 (Shepherders), § 656.17 (Basic Process); § 656.18 (College and University Teachers), and § 656.21 (Supervised Recruitment), the

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).

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 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 shall:

- (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.³

³ 20 C.F.R. § 656.40(a) requires employers to request and obtain a prevailing wage determination prior to filing the Application for Permanent Employment Certification. Based on 8 C.F.R. §§ 204.5(a)(2) and (1)(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." Here, the record contains a prevailing wage

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 must establish that the notice of filing of an Application for Permanent Employment Certification meets all requirements of 20 C.F.R. § 656.10(d)(3).

The petitioner posted its notice of filing from August 18, 2006 to August 31, 2006. As stated by the director, the posting notice submitted is deficient as it did not specifically state the rate of pay. The notice merely stated that “[t]he employer will pay or exceed the prevailing wage, as determined by the U.S. Department of Labor.” As noted above, the petitioner obtained the prevailing wage determination on October 6, 2006, which is after the posting notice was completed. From the record, it is unclear if this is the basis for the petitioner listing that the wage should be in accordance with the prevailing wage but not stating a specific wage. Further, the posting notice did not provide the address of the Department of Labor certifying officer as required by 20 C.F.R. § 656.10(d)(3)(iii), or state a job description specific enough to apprise workers of the educational and/or other specific position requirements. *See* 20 C.F.R. § 656.10(d)(6).⁴

determination with a determination date of October 6, 2006, just prior to the October 20, 2006 filing date.

⁴ The regulation at 20 C.F.R. § 656.10(d)(3)(iii) requires the notice of the filing of an Application for Permanent Employment certification to provide the address of the appropriate certifying officer. The notice in this instance states that contact information for certifying officers may be found “on the Internet at <http://www.foreignlaborcert.doleta.gov/foreign/contacts.asp>.” The notice is deficient as it does not provide the address as required by regulation, but merely provides a link to information requiring an interested party to obtain the address independently. The sample notice in the

As noted above, counsel states on appeal that it presented the petitioner with two sample notices of job availability for posting at the petitioner's offices, one of which contained a space for the prevailing wage rate, and one which did not. Counsel states that the petitioner signed both copies and returned them to its counsel. When filing the Form I-140 and supporting documentation, counsel states that he inadvertently included the job notice which did not contain the stated pay rate. Counsel provided copies of both notices with appeal documentation. The record does not contain the original notice of filing posting with the wage rate to verify authenticity.⁵ Absent the original posting notice with the verified rate of pay, the second notice remains in doubt, particularly considering that the wage was obtained subsequent to posting. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Counsel states that submitting a notice which did not specifically state the rate of pay should be considered harmless error when the notice submitted stated that the employer would pay or exceed the prevailing wage as determined by the U.S. Department of Labor. Alternatively, counsel claims the rate of pay is not required and submits a Department of Labor "Frequently asked Questions" (FAQ) response, which states that "the wage offered does not need to be included in the advertisement." This relates to recruitment advertisements and not the notice of filing. 20 C.F.R. § 656.10(d)(6) specifically requires that the notice contain the rate of pay.

The petitioner failed to meet the posting requirements as set forth in 20 C.F.R. § 656.10(d). Specifically, the initial notice of the filing of an Application for Permanent Employment Certification did not state the rate of pay for the proffered position, and did not provide the address for the appropriate Department of Labor certifying officer. The second notice submitted on appeal is in question as it is not an original and similarly fails to list the address of the appropriate certifying officer, and is, therefore, deficient. The notice additionally fails to set forth the position's job requirements to include the required education.

Beyond the decision of the director, 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

adjudicator's field manual is provided as a sample and does not obviate the need to follow the regulations set forth at 20 C.F.R. § 656.10(d)(6).

⁵ The initial deficient posting submitted was an original document and contained original signatures. The second posting on appeal submitted was only a copy.

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

It is noted that the petitioner submitted, in support of the petition, the annual report for 2003 from [REDACTED] [REDACTED] has a different federal employer identification number ([REDACTED]) than the petitioner [REDACTED] and is, therefore, a separate company. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." In any future filings the petitioner must submit evidence of [REDACTED] ability to pay the proffered wage from the priority date onward, here 2006, and not evidence relating to [REDACTED] who appears to be under no legal obligation to pay the proffered wage.

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.