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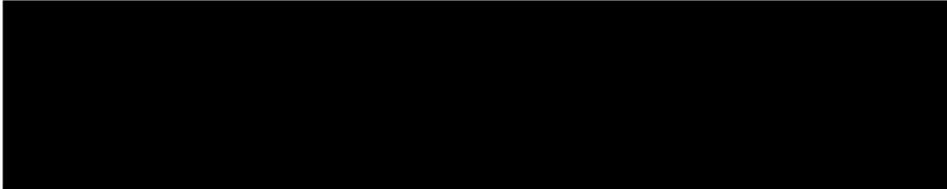
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B6



FILE: LIN 07 001 53052 Office: NEBRASKA SERVICE CENTER

Date: FEB 02 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:

SELF-REPRESENTED

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 health care facility, and 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).

Section 203(b)(3)(A)(ii) of 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), provide 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, Form ETA 9089 replaced the Form ETA 750, Application for Alien Employment Certification. 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: (1) have received a certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); (2) hold a permanent, full and unrestricted license to practice nursing in the state of intended employment; or (3) have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). *See also* 20 C.F.R. § 656.5(a)(2).

On October 03, 2007, the director denied the petition because the petitioner failed to establish that as of the priority date, the beneficiary had received a certificate from the CGFNS, that she held a permanent, full and unrestricted license to practice nursing in the state of intended employment, or that she had passed the NCLEX-RN. The director also noted that the petition includes no documentary evidence or employer attestation concerning the publication of the notice in any in-house media as required under 20 C.F.R. § 656.10(d)(1)(ii). The director further noted that the petitioner failed to submit evidence to establish its continuing ability to pay the proffered wage.

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). 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, the petitioner asserts that the beneficiary passed the CGFNS examination on March 8, 2006, and that, because of "some delay," the beneficiary received her CGFNS certificate on November 4, 2006. The petitioner also states that another case that it filed was approved by USCIS with a similar set of facts.³

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).

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).

³ USCIS, through the AAO, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The record contains the beneficiary's CGFNS certificate dated November 4, 2006. The priority date in the instant case is September 18, 2006. Therefore, the beneficiary had not received a certificate from the CGFNS as of the priority date as required by 20 C.F.R. § 656.15(c)(2). Further, the petitioner did not establish that the beneficiary held a permanent, full and unrestricted license to practice nursing in the state of intended employment, or that she had passed the NCLEX-RN as of the priority date. Therefore, the petitioner has not established that the beneficiary was qualified for the proffered position as of the priority date.⁴

The director also noted that the petition includes no documentary evidence or employer attestation concerning the publication of the notice in any in-house media as required under 20 C.F.R. § 656.10(d)(1)(ii). The regulation at 20 C.F.R. § 656.10(d)(1) requires the following:

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

⁴ Prior to March 28, 2005, the regulation at 20 C.F.R. § 656.10(a)(2) stated that an alien may qualify for Schedule A designation as a nurse if the person had passed the CGFNS examination or if the person held a full and unrestricted license to practice nursing in the state of intended employment. Similarly, the prior regulation on applications for labor certification for Schedule A occupations at 20 C.F.R. § 656.22 (c)(2) stated, in pertinent part:

An employer seeking a Schedule A labor certification as a professional nurse (§ 656.10(a)(2) of this part) shall file, as part of its labor certification application, documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment.

A memorandum dated December 20, 2002, from [REDACTED] (now USCIS), added an additional examination as an acceptable criteria for Schedule A certification. The memorandum instructed Service Centers to accept a certified copy of a letter from the state of intended employment stating that the beneficiary has passed the NCLEX-RN and is eligible to receive a license to practice nursing in that state in lieu of either having passed the CGFNS examination or currently having a license to practice nursing in that state. The PERM regulation changed the CGFNS requirement from requiring the alien to have *passed* the CGFNS examination to requiring the alien to have *received a certificate* from the CGFNS.

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 were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

With the petition, the petitioner submitted its notice of posting indicating that it was posted on the petitioner's bulletin board at the entrance and the employees' lounge. In his RFE, the director indicated that the petitioner should provide evidence that it published notice of filing the application in its in-house media, whether electronic or printed, in accordance with the normal procedures used in its organization for the recruitment of positions similar to the proffered position. In response, the petitioner provided a notice that it posted "internally" at its facility on April 1, 2006. The notice states that it was posted in the general manager's office, the director of nursing's office, the director of staff development's office, the director of social service's office, posted on the bulletin board in the employee's lounge, on the notice board in the main entrance, on the notice board in the nurse's room, on the notice board in the visitor's room, on the notice board in the recreation room, and on the notice board in the activity room.

20 C.F.R. § 656.10(d) does not define "in-house media" or what sources in-house media would comprise. The initial PERM regulation published at 69 Fed. Reg. 77326 provides only that the posting must be "published in any and all in-house media in accordance with the normal procedures used for the recruitment of other similar positions." 69 Fed. Reg. at 77338.

DOL has provided guidance to the PERM regulations and posting requirements through issuance of "Frequently asked Questions." See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (December 31, 2009). DOL FAQ's "Round 10" provide that "the regulations require that the employer publish the notice internally using in-house media – whether electronic or print – in accordance with the normal internal procedures used by the employer to notify its employees of

employment opportunities in the occupation in question.” *Id.* The FAQ response further provides that:

The language should give sufficient notice to interested persons of the employer's having filed an application for permanent employment labor certification for the relevant job opportunity. It is not required to mirror, word for word, the physical posting. In most cases, the physical posting language will be the most efficient way to electronically post the Notice of Filing; in others, the software program used to create the electronic in-house posting may be unable to accept all of the language used in the physical Notice of Filing. In every case, the Notice of Filing that is posted to the employer's in-house media must state the rate of pay and apprise the reader that any person may provide documentary evidence bearing on the application to the Certifying Officer. If there is insufficient space to include the Certifying Officer's address, then information as to where the address can be found must be provided.

Id. We find that the posting notice does not meet the requirements of 20 C.F.R. § 656.10(d). As noted by the director, in addition to the physical posting, publication within an employer's in-house media contemplates the petitioner posting the notice in compliance with its normal procedures, such as in newsletters, intranets, etc. In this instance, the petitioner has not established that it published notice of filing the application for permanent employment certification in any and all of its in-house media in accordance with the normal procedures used for the recruitment of registered nurses in the petitioner's organization, as required by the regulation at 20 C.F.R. § 656.10(d)(1)(ii). Instead, it simply verified that it physically posted notice to its employees at the facility or location of the employment.

Additionally, as noted by the director, the petitioner has not demonstrated its continuing ability to pay the proffered wage beginning on the priority date. The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, September 18, 2006. The proffered wage as stated on the ETA Form 9089 filed with the Form I-140 is \$26.00 per hour (\$54,080.00 per year). The petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter,

until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the beneficiary did not claim to have worked for the petitioner, and the petitioner did not submit W-2 forms or any other compensation documents for the beneficiary. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2006 onwards.

If the 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 reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

With the petition, the petitioner submitted a letter dated July 15, 2006, from [REDACTED], secretary of the petitioner, stating that the petitioner has over 100 employees, that it has a gross annual income of \$5,000,000 and that it has a net annual income of \$400,000. The letter is not from a financial officer of the organization as required by 8 C.F.R. § 204.5(g)(2). Therefore, we decline to accept the letter from the petitioner's secretary as evidence of the petitioner's ability to pay the proffered wage. The director also declined to accept the letter from the petitioner's secretary and, therefore, the director issued a request for evidence (RFE) to the petitioner on July 18, 2007, requesting, among other items, documentary evidence of the petitioner's continuing ability to pay the proffered wage. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The petitioner failed to submit evidence of its ability to pay in response to the RFE. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The petitioner submitted its 2006 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, on appeal. If the petitioner had wanted its 2006 IRS Form 1120S to be considered, it should have submitted the documents in response to the director's RFE. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted

on appeal. Therefore, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.⁵

Beyond the decision of the director, the record does not contain evidence that the petitioner properly posted notice of filing the application for permanent employment certification. 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 at 1002 n. 9 (noting that the AAO reviews appeals on a de novo basis).

The regulation at 20 C.F.R. § 656.10(d)(3) requires the following:

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.

Specifically, the posting failed to meet the requirements of 20 C.F.R. § 656.10(d)(3)(iii), as it does not provide the address of the appropriate Certifying Officer. Therefore, the petitioner has failed to submit a regulatory-prescribed posting notice that conforms to the regulatory requirements for Schedule A registered nurses.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

⁵ USCIS electronic records show that the petitioner has filed ten other I-140 petitions. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2).

The petition will be denied for the reasons discussed above, with each considered as an independent and alternative basis for denial.⁶ 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.

⁶ When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.