



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
LIN 07 223 52600

Office: NEBRASKA SERVICE CENTER

Date: FEB 25 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:



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, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an in-home skilled nursing and therapy services company. It seeks to employ the beneficiary permanently in the United States as a registered nurse. Upon reviewing the petition, the director determined that the petitioner had submitted a redacted Prevailing Wage Determination (PWD) for a different employer and another skilled nursing facility with the instant petition. The director determined that this PWD could not be used by the petitioner, and that a second PWD specific to the proffered position submitted in response to the director's request for evidence dated December 5, 2007 and dated January 7, 2008 was not valid as of the time the instant petition was filed. The director denied the petition.¹

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).²

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.

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 on July 31, 2007. 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 determined 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.

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

¹ The director also stated that USCIS believed that prevailing wage determinations are specific to the requestor and can not be utilized by another employer, even if that employer is within the same jurisdictional area.

² The submission of additional evidence on appeal is allowed by the instructions to 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).

designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program."³ 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 United States Citizenship and Immigration Services (USCIS) office. 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 the USCIS on July 31, 2007. *See* 8 C.F.R. § 204.5(d).

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 regulation at 20 C.F.R. § 656.40(b)(4)(c) states in pertinent part:

Validity period. The [State Workforce Agency (SWA)] must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a SWA [Prevailing Wage Determination (PWD)], employers must file their applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.

In the current case, the petitioner filed the I-140 petition on July 31, 2007. The petitioner submitted two Prevailing Wage Determinations (PWD)s. The first PWD was valid until July 1, 2008, and the second PWD was valid until July 1, 2007. Both PWDs had the identifying data redacted. The director issued an RFE requesting an unredacted PWD, and proof of a valid PWD. In response to the director's RFE, the petitioner submitted an unredacted PWD which revealed that the PWD filed with the I-140 petition was from the correct State Work Agency (SWA) jurisdiction, but was requested by a different employer for a different beneficiary. The PWD was for the same occupation, namely, registered nurse. Additional evidence submitted on January 7, 2008 included a PWD filed by the petitioner reflecting wages of \$27.70 for the position of registered nurse in the area of intended employment that was valid from January 7, 2008 to July 31, 2008. The petitioner also

³ 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).

submitted copies of an on-line wage determination from DOL dated January 14, 2009, reflecting a prevailing wage of \$27.70 for the position of registered nurse in the area of intended employment.

The director determined that this evidence failed to comply with DOL regulations governing Prevailing Wage Determination and denied the petition.

On appeal counsel states that the petitioner submitted one PWD from another employer, [REDACTED] also located within Los Angeles for the same position as the instant petition, and also a new PWD specific to the petitioner in response to the director's RFE. Counsel also notes that the petitioner also provided two DOL online prevailing wage results: one dated July 25, 2007, the date the initial petition and PWD were submitted to USCIS; and the second dated January 14, 2008 (the date that the PWD specific to the petitioner was submitted). Counsel states that all four documents indicate a prevailing wage of \$27.70. Counsel asserts that the regulatory guidance contained at 20 C.F.R. § 656.40, "determination of prevailing wage for labor certifications purposes" does not state that the prevailing wage determination must be for a specific employer and a specific employee. Counsel also refers to an excerpt from the DOL ETA website under the Foreign Labor Certification category, and PERM FAQ Set Round One.

This excerpt states the following:

Question: Is it permissible to use the same prevailing wage determination for more than one application?

Answer: Yes, as long as provisions regarding the validity period are followed, the employer is permitted to use the same prevailing wage determination if the prevailing wage is for the same occupation and skill level; the same wage source is applicable, and the same area of intended employment is involved.

Counsel's assertions on appeal are misplaced and without merit. The AAO notes that the PWD issued by the SWA on behalf of the petition was dated January 7, 2008 and expired on July 1, 2008. As the petitioner's I-140 petition was filed on July 31, 2007, the PWD is not in conformance with DOL regulations because the petition was filed prior to the PWD's validity period. *See* 20 C.F.R. § 656.40 (c), mandating that employers file applications or begin recruitment within the validity period specified by the SWA. Further DOL on-line wage data cannot be accepted as a valid PWD. The regulation at 20 C.F.R. § 656.4(a) requires that employers request a PWD from a SWA having jurisdiction over the area of intended employer. Wage data obtained on-line from DOL is not sufficient and will not be considered.

DOL regulations make clear that the labor certification application process is both employer specific and foreign national specific. The regulation at 20 C.F.R. § 656.11 states that substitution or change to the identity of an alien beneficiary on any application for permanent labor certification, whether filed under this part or 20 CFR § 656 in effect prior to March 28, 2005, and on any resulting certification, is prohibited for any request to substitute submitted after July 16, 2007.

DOL regulations at 20 C.F.R. 656.3 define a U.S. employer as “a person, firm or corporation . . . that proposes to employ an employee at a place within the United States.” Pursuant to 20 C.F.R. 656.40, the “employer must request a PWD from the SWA having jurisdiction over the proposed area of intended employment.” Based on the specific language of DOL regulations, the AAO concludes the PWD is both employer and foreign national specific. Moreover the FAQ reference by counsel provides that the employer may use the same wage for the same occupation and skill level; it does not permit a different employer to use the PWD.

At issue in these proceedings are whether the petitioner has provided sufficient evidence of the prevailing wage, and whether the petitioner can use another petitioner’s PWD to file a Schedule A I-140 petition. In the instant case, the petitioner’s specific PWD is not valid, the on-line data is not enough evidence to establish the validity of the PWD, and that while the initial PWD was valid, it will not be accepted because it was not specific to the petitioner at hand.

The DOL regulations and the PERM FAQs referred to by counsel do not allow one petitioner to use a SWA determination filed by another petitioner on behalf of a different nursing position to establish the prevailing wage. The FAQs only provides that the same petitioner/employer can use the same prevailing wage determination to support more than one filing.

Thus, the record reflects that the petitioner submitted an invalid SWA determination with its instant petition, and then submitted a subsequent prevailing wage determination specific to the petitioner. This second determination was issued after the filing of the instant petition. A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Further, 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).

Beyond the decision of the director, the AAO notes that the petitioner’s posting notice does not conform to the DOL regulations. Where an application fails to comply with the technical requirements of the law it may be denied by the AAO even if the Service Center or District Office did 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). The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). 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

(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.

The regulation at 29 C.F.R. § 1903.2(a)(1) states in relevant part:

Each employer shall post and keep posted a notice or notices, to be furnished by the Occupational Safety and Health Administration, U.S. Department of Labor, informing employees of the protections and obligations provided for in the Act Such notice or notices shall be posted by the employer in each establishment in a conspicuous place or places where notices to employees are customarily posted. Each employer shall take steps to insure that such notices are not altered, defaced, or covered by other material.

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.

In the instant case, the petitioner did not provide any address on its posting notice for the appropriate Certifying Officer in Chicago or Atlanta. The petitioner also does not provide its address. The AAO notes that the posting notice is to serve notice to potential U.S. workers. In the overview of its PERM regulation, the DOL states 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." 69 Fed. Reg. 77326, 77338 (Dec. 27, 2004). However, if neither the certifying officer's address nor the petitioner's address is identified on the posting notice, the U.S. workers cannot provide information with regard to the labor certification.

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.