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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

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FILE: [REDACTED]  
LIN 07 045 50844

Office: NEBRASKA SERVICE CENTER

Date:  
**MAR 22 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:

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 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.”<sup>1</sup> 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).

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<sup>1</sup> 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) that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

On December 18, 2007, the director denied the petition because the petitioner failed to file its application and submit a labor certification filed within the validity period of the prevailing wage determination and failed to submit a notice of filing between 30 and 180 days prior to the filing of the application.

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.<sup>2</sup>

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.

20 C.F.R. §656.40 provides:

(a) Application process. The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer. Unless the employer chooses to appeal the SWA's prevailing wage determination under Sec. 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with an ETA application processing center and maintains the SWA PWD in its files. The determination shall be submitted to an ETA application processing center in the event it is requested in the course of an audit.

\* \* \*

(c) Validity period. The 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 PWD, employers must file their applications or begin the recruitment required by Sec. Sec. 656.17(d) or 656.21 within the validity period specified by the SWA.

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<sup>2</sup> 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).

The prevailing wage determination specified the validity period of the wage as 90 days beginning on June 1, 2007. The petitioner filed its Form I-140 on October 16, 2006, i.e. eight months before obtaining the prevailing wage determination.<sup>3</sup> On appeal, the petitioner states that it “made a good faith effort to comply with the letter of the regulation and [did] comply with the intent of the rule” as the prevailing wage specified on the prevailing wage determination submitted “is in line with the prevailing wage that existed 30 to 180 days prior to the filing date.”<sup>4</sup>

Here, the petitioner obtained the prevailing wage determination after filing the application. The petitioner’s position on appeal that as no harm was done, no problem occurred is misplaced. As no recruitment is required for Schedule A cases, the regulation requires the petitioner to file the Form I-140 during the validity period of the prevailing wage determination. The regulations do not grant the AAO authority to modify the time period during which the petitioner may file the Form I-140 in relation to the prevailing wage determination’s validity period. Therefore, the petitioner failed to obtain and file the I-140 petition with a valid prevailing wage determination and the petition may not be approved.

The petitioner also failed to post in compliance 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

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<sup>3</sup> The prevailing wage determination stated the wage as \$19.64 per hour.

<sup>4</sup> In response to the director’s RFE, the petitioner submitted evidence of its recruitment in the form of an advertisement placed in the *Charlotte Observer* newspaper on June 10, 2007. That advertisement was for registered nurses as well as other positions within the hospital and included no education or experience requirements or the wage to be paid.

20 C.F.R. § 656.5 provides:

We have determined there are not sufficient United States workers who are able, willing, qualified, and available for the occupations listed below on Schedule A and the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. An employer seeking a labor certification for an occupation listed on Schedule A may apply for that labor certification under Sec. 656.15.

Schedule A positions are pre-certified by DOL and therefore do not require the petitioner to complete any recruitment. As no recruitment is required for Schedule A registered nurse petitions, the petitioner must file its application within the prevailing wage determination’s validity dates pursuant to 20 C.F.R. § 656.40.

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.

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).

In addition to the failure of the petitioner to post the notice between 30 and 180 prior to the filing of the Form I-140 and the failure to file the petition during the validity period of the prevailing wage determination, we address other deficiencies with the notice below. 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 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 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 petitioner submitted two notices and an attestation of notice. The first notice is dated June 8, 2007, submitted before the director, and is identical to the notice dated January 14, 2008, submitted on appeal. The first notice was posted from June 8, 2007 to June 19, 2007, after the petitioner filed the Form I-140 and would therefore not be completed 30 to 180 days prior to filing in compliance with 20 C.F.R. § 656.10(d)(3)(iv). On appeal, the petitioner states that the position was subject to “continual posting” starting on August 1, 2006 to “the present” [January 14, 2008, the date of the letter’s signature]. Both notices state that the “[r]ate of pay rang[ed] from \$18.50-\$28.71 per hour,” and did not include any education or experience requirements of the position.<sup>5</sup> Both the notices are deficient as they failed to advise those with information about the application to notify the certifying officer with the DOL and failed to provide the address of the appropriate certifying officer.<sup>6</sup> *See* 20

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<sup>5</sup> *See* 20 C.F.R. 656.10(d)(6), which states that “the notice must contain a description of the job and rate of pay and meet the requirements of this section.”

<sup>6</sup> At the time of posting, for an offer in North Carolina, the petitioner should have listed the Atlanta National Processing Center at 233 Peachtree Street, N.E., Suite 400. *See* FAQ Round 1 at [http://www.foreignlaborcert.doleta.gov/pdf/perm\\_faqs\\_3-3-05.pdf](http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_3-3-05.pdf) (accessed March 11, 2010); *see also Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*.

C.F.R. § 656.10(d)(1)(6). Also, the prevailing wage determination states that the minimum hourly wage is \$19.61, which is higher than the bottom of the range included on the notices. 20 C.F.R. § 656(d)(10) requires that the prevailing wage rate be the bottom of the range on the posting notice.<sup>7</sup> As a result, this notice is insufficient under the regulations and the petition may not be approved.

The June 13, 2007 “attestation” provided by the petitioner states that notice for the beneficiary’s position was completed between June 8, 2007 and June 19, 2007 on “the Emergency Department job posting board, Human Resource job posting board and Human Resource electronic job posting.” As the period of time between June 8, 2007 and June 19, 2007 included only eight consecutive business days and not the required ten (June 9 and 10 were weekend days), the petitioner did not comply with the requirements of 20 C.F.R. § 656.10(d)(1)(ii), and again, would need to be posted prior to filing.<sup>8</sup>

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345 F.3d 683 (9th Cir. 2003).

<sup>7</sup> Additionally, the Department of Labor provides under the “Prevailing Wage” section of its frequently asked questions section of its website:

17. Is the employer permitted to use a wage range as opposed to a single wage rate in advertisements for the job offer?

Yes, the employer may advertise with a wage range as long as the bottom of the range is no less than the prevailing wage rate.

<http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm>. (Accessed March 11, 2010).

<sup>8</sup> The DOL website in its “Frequently Asked Questions (FAQs)” section provides the following definition:

**Time Periods** are the number of days during which an activity must take place. Examples of time periods are the requirement a job order must be placed for 30 days and the requirement that a Notice of Filing must be posted for ten consecutive business days. When counting a time period, both the start date and end date are included in the count. Thus, if a job order is on the State Workforce Agency web site from February 1, 2007, through March 8, 2007, February 1st, is day 1, February 2nd, is day 2, March 2nd, is day number 30, March 8th, is day number 36.

...

As another example, the regulation requires a Notice of Filing posting for a time period of ten consecutive business days. If the order is posted on Monday, April 30, 2007, Monday is day 1, Friday, May 4th, is day 5; the following Monday, May 7th, is day 6; and Friday, May 11th, is day 10. May 11th, is the last day of this time period and is therefore defined as the event and is not counted when calculating the 30 day restriction prior to filing timeline. To calculate the 30 day timeline, May 12th, is day 1, May 13th, day 2, May 23rd, day 12; May 31st, day 20; and June 10th, is day 30. The application can be filed on June 10, 2007.

This attestation provides the only evidence that the petitioner published the position in in-house media as required by 20 C.F.R. § 656.10(d)(1)(ii). The regulation requires that the petitioner show that the Human Resources electronic job posting is the location that the petitioner would normally advertise such a position and the electronic notice must meet the same specifications as those notices posted in physical locations. The electronic notice is the same as the physical notice and therefore is deficient as noted above.<sup>9</sup>

In addition to the petitioner's failure to post the notice or obtain a prevailing wage determination as required, no evidence appears in the record that the beneficiary obtained the requisite experience prior to the filing of the Form I-140 or that the petitioner has the ability to pay the proffered wage. *See*

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Examples of the earliest filing date permissible for a particular Notice of Filing posting or job order placement date are as follows:

If the Notice of Filing is posted on Thursday, June 28, 2007, the posting dates must be June 28 – July 12, and the earliest filing date permissible is Saturday, August 11, 2007, (the notice of filing must be posted for “ten consecutive business days” and, therefore, neither weekends nor the Fourth of July are counted).

...

*See* <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#timeframes5> (accessed March 11, 2010).

<sup>9</sup> The DOL website in its “Frequently Asked Questions (FAQs)” section provides the following:

**10. Does the language on the electronic in-house media Notice of Filing need to be exactly the same as the language on the physical in-house Notice of Filing?**

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. 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.

*See* <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#timeframes5> (accessed March 11, 2010).

*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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a skilled worker that:

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The regulations for the skilled worker classification contain a minimum requirement that the position require at least two years training or experience. The Form ETA 750 submitted with the Form I-140 states that a diploma in nursing is required (specified as 2.5 years of college) and one year of experience as a nurse. In contrast, in response to the director's RFE, the petitioner's ETA Form 9089 stated that an Associate's degree was required. The petitioner submitted no letter in compliance with 8 C.F.R. § 204.5(l)(3)(ii) that he has the requisite one year of experience as a nurse. Additionally, while the record contains a "Nursing Diploma," it is unclear that this was based on two and one half years of study as initially required, or that it is an Associate's degree as specified on the ETA Form 9089. As a result, we are unable to conclude that the beneficiary had the requisite experience in the job offered at the time that this petition was filed.

The petitioner also submitted no evidence of its ability to pay the proffered wage. The regulation at 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 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 U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). 8 C.F.R. § 204.5(g)(2) provides: "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 establish the prospective employer's ability to pay the proffered wage.”

The petitioner must establish that its job offer to the beneficiary is a realistic one. In Schedule A cases, the filing of an I-140 establishes a priority date for the immigrant petition; 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 evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Here, the Form I-140 was submitted on October 16, 2006. The petition listed a wage rate of \$26.75 (calculated based on 36 hours per week). On the Form I-140, the petitioner stated that it employs 600 workers. The petitioner submitted no statement from the financial officer of the organization or any other evidence concerning its finances to show that it was capable of paying the proffered wage.

The petitioner failed submit a labor certification filed within the validity period of the prevailing wage determination and failed to post a notice of the position in conformance with 20 C.F.R. § 656.10(d). Also, the petitioner did not submit evidence of the beneficiary's qualifications for the position as enumerated on the Form ETA 750 or evidence of its ability to pay the proffered wage. Accordingly, the petition may not be approved.

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