



**U.S. Citizenship  
and Immigration  
Services**

(b)(6)

[Redacted]

**APR 05 2012**

Date:

Office: NEBRASKA SERVICE CENTER

FILE: [Redacted]

IN RE:

Petitioner:

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 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 United States 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 [United States 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).

---

<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. § 656.5(a)(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 professional nursing in the state of intended employment, or (3) have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing.

In the instant matter, the petitioner submitted the I-140 Immigrant Petition for an Alien Worker on January 29, 2007. The petition was accompanied by Form ETA 9089, Application for Permanent Employment Certification; the notice of the filing of the Application for Permanent Employment Certification which was provided to the bargaining representative of the New York State Nurses Association and which is dated August 10, 2006; the Prevailing Wage Determination (PWD) issued by the New York State Department of Labor, dated August 7, 2006; along with other documents which support the request for Schedule A certification.

Since the director recognized that the notice of filing the Application for Permanent Employment Certification was submitted to the bargaining representative and not posted at the employer's place of business, he concluded that the job opportunity is covered by a Collective Bargaining Agreement (CBA). In reviewing the PWD issued by the Department of Labor (DOL), the director also ascertained that the DOL made its determination using the "All Industries Database," that is the DOL performed an analysis of all of the workers similarly employed in the area of intended employment, rather than deriving the wage from the CBA. On November 19, 2008, the director issued a request for evidence. In the request, the director noted that the petitioner did not identify the place of employment as being subject to a CBA on the PWD. Consequently, the director noted that the PWD was not generated based upon the proper source, that is the CBA. Therefore, the director requested that the petitioner provide a PWD which was obtained prior to the filing of the I-140 petition and which was valid at the time of filing. Further, the director indicated that the PWD would have to be based upon the CBA. Additionally, the director noted that the petitioner failed to complete Section I of Form ETA 9089 which is the section related to recruitment. Within this section, the petitioner would have indicated that the job opportunity was subject to a CBA. Consequently, the director requested that the petitioner provide the completed Section I.

On January 15, 2009 the petitioner submitted the response to the director's request. The response consisted of a new PWD, dated December 5, 2008; a letter from the New York State Department of Labor, dated December 5, 2008; the CBA between the New York State Nurses Association and [REDACTED] signed on May 10, 2007 and May 25, 2007 by the petitioner and the bargaining unit respectively; and the missing portion of Form ETA 9089.

On May 21, 2009, the director denied the petition because the petitioner failed to submit a valid prevailing wage determination in accordance with 20 C.F.R. § 656.40. That is, the director found that the PWD, which was initially submitted with Form I-140 and Form ETA 9089, was not valid because the petitioner failed to notify the DOL that the job opportunity was subject to a CBA. The, DOL, not having had this information issued its determination utilizing an incorrect source of wage data. Though the petitioner requested a new PWD, having notified the DOL that the job opportunity

is subject to a CBA and having provided the DOL with that CBA, the new PWD was generated on December 5, 2008 almost two years after the filing of the instant I-140 petition. Therefore, the director determined that at the time of filing the instant I-140 petition, the petitioner did not have a valid PWD to support Form ETA 9089 and the request for Schedule A certification.

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.<sup>2</sup>

On appeal, counsel submits a brief; an excerpt from the website of the American Immigration Lawyers Association (AILA) in which members of AILA address issues pertaining to Schedule A certification; a copy of Form I-797C showing USCIS' receipt of the petitioner's Form I-290B; and a copy of the decision to deny the applicant's Form I-485, Application to Register Permanent Residence or Adjust Status.

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 asserts that USCIS denied the instant petition because the director found that the petitioner did not comply with the regulatory requirements which govern the filing of applications for prevailing wage determinations. Counsel asserts that USCIS found that the State Workforce Agency (SWA) did not use the correct source in determining the prevailing wage and that, consequently, the prevailing wage determination issued to the petitioner was not valid. Counsel notes that the proffered salary is based upon the result of a collective bargaining agreement. That this information was not provided to the DOL when application was made for the prevailing wage determination was, according to counsel, "a harmless error, which did not have a substantial impact on the petition and no impact in adversely affecting the wages of U.S. workers similarly employed."

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 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'r 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

---

<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).

(b)(6)

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 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 . . . 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).

As set forth above, the petitioner must provide notice of the filing of the Application for Permanent Employment Certification to the bargaining representative of the employer's employees pursuant to 20 C.F.R. § 656.10(d)(3)(iv) between 30 and 180 days prior to the January 29, 2007 filing, and have met the other requirements of 20 C.F.R. § 656.10(d).

Based upon the evidence in the record, the petitioner provided notice of the filing of the Application for Permanent Employment Certification to the bargaining representative of the New York State Nurses Association on August 10, 2006 which is 172 days from the filing of the instant I-140 petition. This notification is in compliance with the regulatory requirement at 20 C.F.R. § 656.10(d)(1)(i) and (3)(iv). What is instructive about the petitioner's compliance, in this regard, is that notice was provided to the bargaining representative of the employer's employees, rather than having been posted at the facility or location of the employment. Discussion related to this issue will follow.

The issue in this matter is that the petitioner failed to obtain a valid prevailing wage determination (PWD) in compliance with 20 C.F.R. § 656.40 from the relevant State Workforce Agency (SWA) prior to filing. The regulation at 20 C.F.R. § 656.40 specifically sets forth that the petitioner must request a prevailing wage rate and the prevailing wage rate obtained is assigned a validity period.

20 C.F.R. § 656.40(b) further sets forth the method by which the SWA determines the appropriate prevailing wage, stating:

- (1) Except as provided in paragraphs (e) and (f) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms-length between the union and the employer, the wage rate set forth in the CBA agreement is considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it is considered the “prevailing wage” for labor certification purposes.
- (2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraph (b)(3) of this section, of the wages of workers similarly employed in the area of intended employment...

Within their Frequently Asked Questions and Answers (FAQs), the DOL provides guidance to employers seeking a PWD under the terms of a CBA.<sup>3</sup> Question #1 provides guidance for those seeking a PWD based upon a source other than the Occupational Employment Statistics (OES) and it states:

On the ETA Form 9141 item D.a.6 (Job Duties), after the description of job duties, the employer should include a sentence surrounded by asterisks (\*\*\*) requesting the use of a specific source, with the name, edition, revision and publication date as appropriate. Additionally, the employer may also need to provide supporting documentation, as explained in the questions and answers immediately following.

Question #3 provides more specific guidance for those employers who are bound by a CBA, with respect to the types of documentation which must be provided to the DOL when seeking a PWD and it states:

When a job opportunity is covered by a collective bargaining agreement, the employer must submit the following at the time it submits the ETA Form 9141:

1. A copy of the relevant portion of the CBA;
2. A letter, on letterhead, from the employer, stating the relevant section of the CBA, the CBA job title, and the appropriate wage; and
3. A letter, on letterhead, from the collective bargaining unit’s (union) authorized representative, stating the relevant section of the CBA, the CBA job title, and the appropriate wage.

In order to use a prevailing wage determination (PWD), “employers must file their [Schedule A] applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.” See 20 C.F.R. § 656.40(c). The petitioner must file Form ETA 9089 and

<sup>3</sup> <http://www.foreignlaborcert.doleta.gov/faqanswers.cfm> (accessed February 22, 2012).

Form I-140 with the prevailing wage determination issued by the SWA having jurisdiction over the proposed area of employment. See 20 C.F.R. § 656.15(b)(i). A petitioner must establish eligibility at the time of filing. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

The PWD in the record of proceeding is dated December 5, 2008 with validity dates of December 5, 2008 to June 30, 2009. Accordingly, the wage determination was obtained subsequent to filing the petition and was not valid at the time of posting or at the time of filing.

Though counsel contends that the petitioner's failure to notify the DOL of the existence of a CBA, and therefore, failure to obtain a valid PWD had no impact on the case, the regulatory requirements are clear. The petitioner is bound to request a PWD from the DOL and it is the DOL's responsibility to generate said PWD in accordance with the regulation at 20 C.F.R. § 656.40. In order for the DOL to be able to generate an accurate PWD, the petitioner must provide the DOL with accurate information regarding the nature of the proffered position, one element of which is whether or not the job opportunity is governed by a CBA. Since the petitioner did not provide the DOL with the accurate information, the DOL was not able to generate a correct and valid PWD.

It is noteworthy that the DOL issued the PWD on August 7, 2006. Even though the PWD was issued for another job opportunity, the position is the same as that for which the beneficiary in the instant scenario is being petitioned. Nevertheless, the petitioner had three days to review this document prior to providing notice to the bargaining unit representative. According to the DOL's FAQs, during that time, had the petitioner found any discrepancies, they could have filed a new request for a PWD with the DOL.<sup>4</sup> Further, if the petitioner had been required to file a new PWD request, they had nearly six months prior to the filing of the instant I-140 petition to do so. The petitioner provided no evidence demonstrating that these measures were taken. Also, the PWD had been issued in accordance with the filing of an Application for Permanent Employment Certification for an individual other than the beneficiary of the instant petition. The petitioner was afforded the opportunity to provide a PWD which might have been filed for other similar job opportunities which was valid at the time the instant I-140 petition was filed. The petitioner provided no such evidence but rather sought to obtain a new PWD.

Moreover, even though the petitioner provided notice of having filed for an Application for Permanent Employment Certification to the bargaining unit representative on August 10, 2006, they failed to provide such attestation on Form ETA 9089 which requests such information in Section I. In fact, the Form ETA 9089 which was initially submitted with the instant I-140 had no information contained in Section I of the document. The information was only included after the director issued his request for additional evidence.

The petitioner failed to file the petition with a copy of a valid prevailing wage determination, as required by 20 C.F.R. § 656.40(a). Accordingly, the petitioner has failed to meet the regulatory requirements, which require that the prevailing wage determination be obtained prior to filing the Schedule A application.

<sup>4</sup> <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#issuance5> (accessed February 28, 2012).

(b)(6)

Page 9

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.