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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: **AUG 01 2012** OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 describes itself as a healthcare hospital. It seeks to permanently employ the beneficiary in the United States as a registered nurse. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹

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.

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.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The petition is for a Schedule A occupation. A Schedule A occupation is an occupation codified at 20 § C.F.R. 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.*

Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified ETA Form 9089. See 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i); see also 20 C.F.R. § 656.15.

If the Schedule A occupation is a professional nurse, the petitioner must establish that the

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 8 C.F.R. § 103.2(a)(1). See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

beneficiary has a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). See 20 C.F.R. § 656.5(a)(2). The record contains a copy of the beneficiary's certificate of registered nurse issued by the State of California Board of Registered Nursing [REDACTED] and a copy of the beneficiary's registration certificate issued by the [REDACTED], stating that the beneficiary was registered to practice in New York State through July 31, 2008.

Petitions for Schedule A occupations must also contain evidence establishing that the employer provided its U.S. workers with notice of the filing of an ETA Form 9089 (Notice) as prescribed by 20 C.F.R. § 656.10(d), and a valid prevailing wage determination (PWD) obtained in accordance with 20 C.F.R. § 656.40 and 20 C.F.R. § 656.41. See 20 C.F.R. § 656.15(b)(2).

The regulation at 20 C.F.R. § 656.15(b) requires an Application for Permanent Employment Certification form for Schedule A to include a prevailing wage determination (PWD) in accordance with § 656.40 and § 656.41.

The regulation at 20 C.F.R. § 656.40(c) states:

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 §§ 656.17(d) or 656.21 within the validity period specified by the SWA.

In the instant case, the petitioner submits a PWD from the [REDACTED] in California. The PWD was determined on January 8, 2007 and the PWD indicates that this prevailing wage is valid for filing applications and attestations until July 1, 2007. The record shows that the instant Schedule A application was filed on July 27, 2007. The PERM regulations expressly state that an employer must file its application within the validity period specified by the SWA. In the instant case, the petitioner did not file its Schedule A application within the validity period specified by [REDACTED]. Therefore, the petitioner failed to comply with the regulatory requirements with respect to the PWD validity period.

On appeal, counsel asserts that, although the petitioner filed Form I-140 after the PWD expired, it actually initiated its recruitment process before the PWD expiration.

³ According to the information obtain on the State of California Board of Registered Nursing, the beneficiary's license was issued on December 8, 2006 and expired on March 31, 2012. See [REDACTED]

The petitioner does not dispute that the PWD was expired at the time the petition was filed on July 27, 2007. On appeal, counsel asserts that 20 C.F.R. § 656.40(c) allows a petition to be filed with an expired prevailing wage determination if the recruitment in connection with the petition was completed during the validity period of the prevailing wage determination. This assertion is incorrect. As the offered position of registered nurse is one on 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, no recruitment is required for these positions. Therefore, with respect to Schedule A filings, 20 C.F.R. § 656.40(c) requires that the prevailing wage determination be valid at the time that the petition is filed.

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 employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the certifying officer as follows:

...

- (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment . . . In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization.

...

- (3) The notice of the filing of an Application for Permanent Employment Certification shall:

- (i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
- (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
- (iii) Provide the address of the appropriate Certifying Officer; and
- (iv) Be provided between 30 and 180 days before filing the application.

...

(6) If an application is filed under the Schedule A procedures at § 656.15. . . the notice must contain a description of the job and rate of pay and meet the requirements of this section.

The requirement of 20 C.F.R. § 656.10(d) to post the position for Schedule A eligibility is not a form of recruitment. Rather, the posting is required to give notice of the filing of the Application for Permanent Employment Certification. As stated above, the DOL has already determined that there are not sufficient United States workers who are able, willing, qualified and available for the position, and no recruitment is required.

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).

The petitioner failed to submit a valid PWD in accordance with 20 C.F.R. § 656.40.

Beyond the decision of the director,⁴ the evidence of record contains inconsistencies that call into question whether the petitioner will be the beneficiary's actual employer. *See* 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3.

In determining whether the petitioner will be the beneficiary's actual employer, USCIS will assess the petitioner's control over the beneficiary in the offered position. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"); *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the

⁴ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. See *Clackamas*, 538 U.S. at 448-449; cf. New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

The current petition was filed by [REDACTED], located at [REDACTED]. The record contains an offer of employment written on [REDACTED] letterhead, signed by [REDACTED] Director of Human Resources. [REDACTED] wrote that [REDACTED] d/b/a [REDACTED] was confirming its offer of employment to the beneficiary. The appeal was filed by counsel on behalf of [REDACTED] and [REDACTED]. [REDACTED] appear to be two different hospitals. On both the labor certification and the I-140 petition, the petitioner stated that the beneficiary will work at [REDACTED]. However, the offer of employment comes from [REDACTED] located at [REDACTED]. [REDACTED] Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Public Records information show that [REDACTED] was incorporated on September 22, 2000, and currently has an active status. [REDACTED] was incorporated on February 8, 2001 and also has an active status. However, [REDACTED] and [REDACTED] are two different entities. See <http://kepler.sos.ca.gov/cbs.aspx> (accessed June 11, 2012). No evidence was submitted to establish a relationship, if any, between the two entities.

⁵ According to information obtained from the [REDACTED] website, the [REDACTED] is located at [REDACTED] and it was originally founded by a group of community physicians in 1973. The facility was later purchased by [REDACTED]. In August of 1994, [REDACTED] of Redlands, assumed ownership. In February 1996, ownership changed hands again when [REDACTED], a nationwide leader in the provision of physician-directed and patient-centered healthcare, purchased the entire [REDACTED] network. The facility changed ownership in January 2001 to [REDACTED]. The last time the facility changed ownership was in July 2006 to its current operator [REDACTED]. Other hospital affiliates operated by [REDACTED] include [REDACTED] (accessed June 11, 2012).

Due to the inconsistencies of record, it is not possible to determine the beneficiary's actual employer. Therefore, the petition must also be denied because the petitioner failed to establish that it will actually employ the beneficiary.

Also beyond the decision of the director, the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. See 8 C.F.R. § 204.5(g)(2).

In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That provides further 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 establishes the prospective employer's ability to pay the proffered wage." (Emphasis added.) To establish its ability to pay, the petitioner submitted a letter dated July 2, 2007, signed by [REDACTED] Chief Financial Officer of [REDACTED] stated that the petitioner is a full service healthcare facility and medical center founded in 1972 and currently has 560 employees, with a gross annual income of \$171,432,899.00 for 2006. No other evidence was submitted.

Given the record as a whole, we find that USCIS need not exercise its discretion to accept the letter from [REDACTED] USCIS records indicate that the petitioner has filed numerous Form I-140 petitions. In addition, the petitioner has also filed several Form I-129 nonimmigrant petitions. Consequently, USCIS must also take into account the petitioner's ability to pay the beneficiary's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. Given that the number of immigrant and nonimmigrant petitions, the AAO cannot rely on a letter from the petitioner's CFO referencing the ability to pay a single unnamed beneficiary.

The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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, that burden has not been met.

ORDER: The appeal is dismissed.