(b)(6)

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

[redacted]

DATE: DEC 21 2012 OFFICE: NEBRASKA SERVICE CENTER FILE [redacted]

IN RE: Petitioner: [redacted]
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:

[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 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,

Rachel M Tiffio
for
Ron Rosenberg
Acting 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 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 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).

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[1] 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).

In the instant case, the petitioner failed to submit a PWD that meets the requirements of 20 C.F.R. § 656.40. The petitioner must obtain a PWD and file the petition and accompanying ETA Form 9089 with USCIS within the validity period specified on the PWD. *See* 20 C.F.R. § 656.40(c). The instant petition and a Form ETA 750 were filed on July 16, 2007. New DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. In response to the director's request for evidence (RFE) of December 17, 2008, the petitioner submitted an ETA Form 9089 on March 11, 2009 to replace the Form ETA 750 previously submitted.

The record of proceeding contains a PWD dated November 9, 2006, with validity dates of November 15, 2006 to July 1, 2007. Accordingly, this PWD was not valid on the date of filing, as it had expired prior to July 16, 2007. The record of proceeding also contains a PWD dated January 27, 2009, with validity dates of January 27, 2009 to July 1, 2009. Accordingly, this PWD was not valid on the date of filing as the validity period was subsequent to July 16, 2007.

On appeal, counsel asserts that any procedural omissions were insubstantial and immaterial and due to the sudden and erratic changes in priority dates becoming unavailable in 2007. Counsel asserts that its recruitment was completed during the validity period of the PWD, but that priority dates were not available on or before the Form I-140 was filed. Counsel states that it would have been impossible to request a new PWD, complete recruitment, and file Form I-140 within the window allowed by the Department of State. Counsel further asserts that employers must begin the recruitment required by Section 656.17(d) or 656.21 within the validity period specified by the State Workforce Agency (SWA), a requirement with which the petitioner complied, and thus the petitioner is in substantial compliance with the law.

The regulation at 20 C.F.R. § 656.40(c) specifically states that a Schedule A application must be filed within the validity period of the PWD. As noted above, this is in contrast to the regulatory guidance for non-Schedule A labor certifications, which requires the PWD to be valid during the *recruitment* period for the offered position. *Id.* Since Schedule A occupations are designated by the DOL as shortage occupations, no recruitment is conducted as part of the Schedule A application process. *See* 69 Fed. Reg. 77326, 77338 (Dec. 27, 2004) (noting 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").

Therefore, the posting requirement for Schedule A occupations, though necessary, is not a recruitment step. Further, the AAO disagrees that the failure to submit a valid PWD as required by 20 C.F.R. § 656.40(c) is insubstantial or immaterial.

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 AAO finds that the director properly denied the petition because the petitioner failed to submit a valid PWD in accordance with 20 C.F.R. § 656.40.

Beyond the decision of the director,[3] the petitioner has also not established that the Posting submitted with the petition met the applicable regulatory requirements. Petitions for Schedule A occupations must 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 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).

For the notice requirement, the employer must provide notice of the filing of an ETA Form 9089 to any bargaining representative for the occupation, or, if there is no bargaining representative, by posted notice to its employees at the location of the intended employment. *See* 20 C.F.R. § 656.10(d)(1).

The regulation at 20 C.F.R. § 656.10(d)(3) states that the Notice 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.

Notices for Schedule A occupations must also contain a description of the job offered and the rate of pay. *See* 20 C.F.R. § 656.10(d)(6).

In cases where there is no bargaining representative, the Notice must be posted for at least 10 consecutive business days, and it must be clearly visible and unobstructed while posted. 20 C.F.R. § 656.10(d)(1)(ii). The Notice must be posted in a conspicuous place where the employer's U.S. workers can readily read it on their way to or from their place of employment. *Id.* In addition, the Notice must be published "in any and all in-house media, whether electronic or printed, in

[3] 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).

accordance with the normal procedures used for the recruitment of similar positions in the employer's organization." *Id.* The satisfaction of the Notice requirement may be documented by "providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media" used to distribute the Notice. *Id.*

In the instant case, the record of proceeding contains a Notice with a posting date of January 30, 2007 and a removal date of February 13, 2007. The record of proceeding also contains a Notice with a posting date of February 6, 2009 and a removal date of March 1, 2009.

Both Notices are deficient as they fail to provide the address of the appropriate Certifying Officer as required by 20 C.F.R. § 656.10(d)(3). 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.[4]

Properly posting the Notice, however, will not necessarily lead to approval of the petition. In order for the petition to be approved, the petitioner must submit with the petition a PWD that fully complies with the requirements of 20 C.F.R. § 656.40. *See also* 20 C.F.R. § 656.15(b)(1). The regulation at 20 C.F.R. § 656.40(c) specifically states that a Schedule A application must be filed within the validity period of the PWD. As noted above, this is in contrast to the regulatory guidance for non-Schedule A labor certifications, which requires the PWD to be valid during the *recruitment* period for the offered position. *Id.* Since Schedule A occupations are designated by the DOL as shortage occupations, no recruitment is conducted as part of the Schedule A application process. *See* 69 Fed. Reg. 77326, 77338 (Dec. 27, 2004) (noting 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").

Therefore, the posting requirement for Schedule A occupations, though necessary, is not a recruitment step, and the rate of pay on the Notice does not have to exactly match the wage listed on the PWD submitted with the petition. Furthermore, as explained above, the Posting must have contained a rate of pay for the employment opportunity, which was equal to or greater than the prevailing wage at the time of the Posting. If this requirement is not met, then it cannot be concluded that the Posting actually listed the "rate of pay" for the job in question. 20 C.F.R. § 656.10(d)(6).

In the instant matter, the hourly wage range expressed on both Notices was $30.00. The PWD obtained January 27, 2009 reflected an increase in the hourly wage to $31.03. The proffered wage on the ETA Form 9089 was $30.00 to $31.03 per hour. This PWD was not valid on July 16, 2007 when the petition was filed. As the proffered wage allows a payment of $30.00 per hour and thus does not meet or exceed this PWD rate of pay, the petition does not meet the regulatory requirements.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is

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[4] *See* http://www.foreignlaborcert.doleta.gov/perm.cfm (accessed October 18, 2012).

qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Form ETA 750 submitted with the petition states that the offered position requires a bachelor's degree in nursing, U.S. licensure as a registered nurse, three years of training in registered nursing, and one year of experience. The ETA Form 9089 submitted in response to the RFE states that the offered position requires an associate's degree in nursing, three years of training in registered nursing, and twelve months of experience. On the ETA Form 9089, the beneficiary claims to qualify for the offered position based on experience as a nursing assistant working for in Wilmette, Illinois from August 2002 to August 2004 and as a senior nurse at in Oroquieta City, Philippines from 1982 to 1991.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record does not contain any letters of experience from former trainers or employers.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.