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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:

JUL 31 2012

Office: NEBRASKA SERVICE CENTER

FILE:

IN RE:

Petitioner:

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:

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, denied the petitioner's employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner is a skilled nursing facility. It seeks to employ the beneficiary permanently in the United States as a registered nurse pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). The petition contains a blanket labor certification application 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 U.S. 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.

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 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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 designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program."¹ 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).

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:

¹ 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 ETA Form 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).

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.

The director determined that the petitioner failed to submit a valid PWD and therefore the petition was not accompanied by a proper application for labor certification. The director denied the petition accordingly on February 2, 2009. The director also noted that the petition included no documentary evidence or employer attestation concerning the publication of the notice in any in-house media as required under 20 C.F.R. § 656.10(d)(1)(ii), and that the petitioner failed to provide the address of the appropriate Certifying Officer of the DOL or USCIS office on its notice of filing.

On appeal, the petitioner submitted a statement that [REDACTED] does not use any other in-house media to recruit for similar positions. Therefore, the director's note regarding lack of evidence concerning the publication of the notice in any in-house media is withdrawn.

Counsel also asserts that the failure to submit the petition within the PWD's validity date was beyond the petitioner's control and was through no fault of its own. Counsel states that the petitioner prepared and submitted a request for a PWD at the California Employment Development Department (EDD) on July 27, 2007. However, the EDD did not issue the PWD until August 2, 2007. In order to meet the filing deadline for the beneficiary's Form I-485 Application to Register Permanent Residence or Adjust Status, the petitioner filed the petition without a valid PWD. Counsel states, "To comply with both the July 31, 2007 cut-off for filing the I-140 and the August 17, 2007 cut-off for filing the I-485, the Petitioner had no choice but to submit the I-140 petition and accompanying ETA 9089 on July 30, 2007. Had the Petitioner delayed the filing of the I-140 petition until the PWD was issued on August 2, 2007, the Beneficiary would have been barred from submitting his I-485 application prior to the August 17, 2007 cut-off and have been forced to wait for the priority date to become current again... The Petitioner contends that the denial of the instant I-140 petition based on such a *de minimis* technicality is grossly unfair and is a violation of due process, such that the decision must be reversed at this time."

The petitioner submitted a PWD from the EDD that was determined on August 2, 2007. The PWD indicates that this prevailing wage is valid for filing applications and attestations until July 1, 2008. Therefore, the PWD was valid from August 2, 2007 to July 1, 2008. The record shows that the instant Schedule A application was filed on July 30, 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. Therefore, the petitioner failed to comply with the regulatory requirements with respect to the PWD validity period. Counsel asserts that the failure to submit a valid PWD was a deficiency beyond the petitioner's control due to the need to expeditiously file the instant petition. Counsel states that the PWD was "expeditiously prepared and submitted" to the EDD on July 27, 2007. The AAO notes that the petitioner's notice of filing submitted with the petition was posted from June 1, 2007 to June 15,

2007. Counsel provides no evidence that the PWD was submitted to the EDD earlier than July 27, 2007, more than one month after the completion of the posting requirement.

Counsel also points to the “July 2, 2007 Update on July Visa Availability” issued by USCIS, asserting that the USCIS announcement that petitions must be filed by July 30, 2007 required that the petition be filed without a valid PWD. Counsel provides no evidence that the PWD was submitted to the EDD before July 27, 2007, nearly one month after the July 2, 2007 update.

Further, the regulation at 20 C.F.R. § 656.10(d)(3) requires the following:

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 petition, the posting states, “Any person may provide documentary evidence bearing on the application to the local Employment Service Office/or the Regional Certifying office of the Department of Labor. No address is listed. 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. For employment in California, the proper address of the appropriate Certifying Officer² is:

United States Department of Labor
Chicago National Processing Center
Railroad Retirement Board Building
855 N. Rush Street, 12th Floor
Chicago, Illinois 60611

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.

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).

The Form I-140 petition identifies [REDACTED] as the employer and the petitioner. The regulation at 8 C.F.R. § 103.2(a)(2) requires that the petitioner sign the petition. In this instance, no employee or officer of [REDACTED] signed or certified Form I-140.

² See <http://www.foreignlaborcert.doleta.gov/perm.cfm> (accessed July 26, 2012).

The only signature or certification on that form is that of [REDACTED] who represents the petitioner as counsel for the immigrant visa petition. [REDACTED] certified Part 8 of the Form I-140, "Petitioner's Signature," thereby attempting to file the petition on behalf of the actual United States employer. However, the regulations do not permit [REDACTED] who is not the petitioner, to sign or certify Form I-140 on behalf of a United States employer.

The regulation at 8 C.F.R. § 204.5(c) states:

Filing petition. Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act. An alien, or any person in the alien's behalf, may file a petition for classification under section 203(b)(1)(A) or 203(b)(4) of the Act (as it relates to special immigrants under section 101(a)(27)(C) of the Act).

The regulation at 8 C.F.R. § 103.2(a)(2) states:

Signature. An applicant or petitioner must sign his or her application or petition. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the application or petition, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the application or petition, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on an application or petition that is being filed with the [USCIS] is one that is either handwritten or, for applications or petitions filed electronically as permitted by the instructions to the form, in electronic format.

There is no regulatory provision that waives the signature requirement for a petitioning United States employer or that permits a petitioning United States employer to designate a "representative agent," attorney or accredited representative to sign the petition on behalf of the United States employer. The petition has not been properly filed because the petitioning United States employer, [REDACTED] did not sign or certify the petition. Pursuant to 8 C.F.R. § 103.2(a)(7)(i), an application or petition which is not properly signed shall be rejected as improperly filed, and no receipt date can be assigned to an improperly filed petition.

The petition has not been properly filed by a United States employer. Therefore, we must reject the appeal.³

³ Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). The petitioner failed to submit tax returns, annual reports, or audited financial statements which would allow the AAO to determine its ability to pay. The

ORDER: The appeal is rejected.

petitioner submitted a letter from [REDACTED] Executive Director, stating that the petitioner employs 130 employees and had a gross annual income of six million dollars in 2006. However, the statement was not issued by a financial officer of the organization.

Additionally, according to USCIS records, the petitioner has filed another I-140 petition on behalf of another beneficiary. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

Also beyond the decision of the director, the petitioner has not established that the beneficiary is 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)(1), (12). In the instant case, the labor certification states that the offered position requires a California R.N. license. The record does not contain any evidence of the beneficiary's California R.N. license.

These issues must be resolved with any future filings.