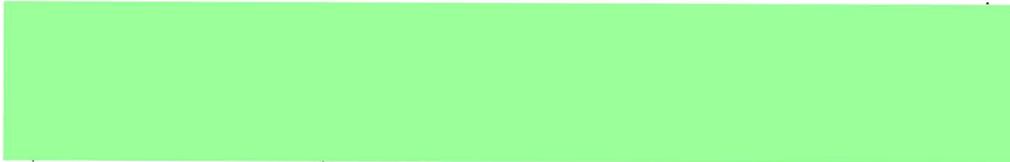




**U.S. Citizenship  
and Immigration  
Services**

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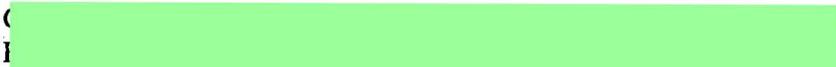


Date: **JUN 11 2012**

Office: NEBRASKA SERVICE CENTER

FILE: 

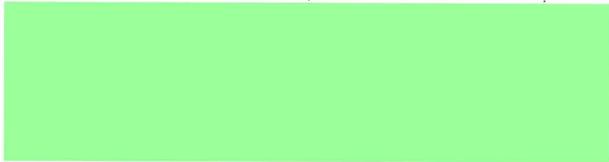
IN RE:

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.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based preference immigrant visa petition was initially denied by the Director, Nebraska Service Center. The petitioner appealed to the Administrative Appeals Office (AAO). The matter will be remanded to the Nebraska Service Center.

The petitioner is an acute care facility. It seeks to employ the beneficiary permanently in the United States as a registered nurse/staff 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.

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).

One of the requirements to meet Schedule A eligibility is for the petitioner to obtain a prevailing wage determination (PWD) "in accordance with [20 C.F.R.] § 656.40 and § 656.41" along with the petition and the completed ETA Form 9089. 20 C.F.R. § 656.15(b)(1). The regulation at 20 C.F.R. § 656.40(c) states that a Schedule A application must be filed within the validity period of this PWD.

Title 20, Code of Federal Regulations, Section 656.40 states, in pertinent part:

(b) Determinations. The National Processing Center will determine the appropriate prevailing wage as follows:

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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 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).

(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. The wage component of the DOL Occupational Employment Statistics Survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey under paragraph (g) of this section.

The instant petition, which includes both the Form I-140 petition and an ETA Form 9089 application, was filed with USCIS on July 6, 2007. The offered position is full-time and record includes the following information regarding the prevailing and proffered wage:

- The Form I-140 states that the proffered wage is \$61,528 per year.
- The ETA Form 9089 states that the proffered wage is \$61,528.<sup>2</sup>
- The PWD issued by the New York State Department of Labor, and valid from June 28, 2007 to September 26, 2007, states that the prevailing wage for the offered position is \$25.43 per hour (which is \$52,894.40 per year, based on forty hours per week).
- The Notice of Employment Opportunity Posting which was posted at the petitioner's place of business on May 1, 2007, states that the salary for the proffered position is \$61,528 (no rate of pay is listed).

As further explained below, the hourly rate listed in the PWD is lower than the proffered wage listed in the Employment Opportunity Posting and on the ETA Form 9089.

On December 17, 2008, the director issued a Request for Evidence (RFE) advising that the submitted PWD was determined based on the Occupational Employment Statistics (OES) wage data<sup>3</sup> for O\*NET<sup>4</sup> job code 29-1111 (Registered Nurses), and not on the collective bargaining unit

<sup>2</sup> Section G of the ETA Form 9089 is incomplete, as it does not indicate whether the rate of pay is per hour, week, bi-weekly, month, or year.

<sup>3</sup> OES wage data can be found on the Foreign Labor Certification Data Center Online Wage Library (<http://www.flcdatcenter.com/OesWizardStart.aspx>).

<sup>4</sup> O\*NET is the DOL's public online database at <http://online.onetcenter.org>. O\*NET is described as "the nation's primary source of occupational information, providing comprehensive information on

agreement. The RFE requested that the petitioner submit a valid PWD obtained in accordance with 20 CFR § 656.40. On December 29, 2008, the petitioner, through counsel, responded and submitted the original PWD request, stating that the petitioner had specifically noted that the wage was subject to a union agreement and including the collective bargaining wage memo. The petitioner's original PWD request does indicate YES for Question 16 ("Is the wage subject to a union agreement?"). Counsel stated that "...despite such indication, the NY Workforce still considered that Occupational Employment Statistics (OES) database to be the prevailing wage..." The PWD indicates on Question 8 ("Prevailing Wage Source") that the determination was based on OES. Counsel also contended that the rate of pay stated on the PWD was identical to the union wage. A copy of the Memorandum of Agreement between the City of New York and the Health & Hospitals Corporation and the New York State Nurses Association was submitted, indicating that the minimum wage for a staff nurse was \$61,528 as of October 1, 2006. On Question 13 ("Rate of Pay") the petitioner indicated "\$61,528/year."

On February 5, 2009, the director denied the petition on the basis that the PWD was issued based on information from the "all industries database" when it appears that the wage is subject to a collective bargaining agreement. The director concluded that the petitioner failed to submit a valid PWD. Additionally, as no valid PWD was submitted, the director also determined that the petition was not accompanied by a proper application for labor certification. The director denied the petition accordingly. The petitioner appealed and the matter is now before the AAO.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The record shows that the appeal is properly filed, timely and makes a specific 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 considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>5</sup>

On appeal, counsel for the petitioner renews his assertions stating that the petitioner properly disclosed the collective bargaining agreement when requesting the prevailing wage determination and that the petitioner has fully complied with the prevailing wage requirements as prescribed by the relevant regulations. Counsel states:

"The fact that the DOL has chosen the wage 'All Industry' standard despite the fact that Collective Bargaining Agreement (CBA) was properly disclosed by Petitioner is

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key attributes and characteristics of workers and occupations." O\*NET incorporates the Standard Occupational Classification (SOC) system, which is designed to cover all occupations in the United States

<sup>5</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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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a prerogative of such government agency. Bottom line is that on record, the wage offered is the same as that agreed upon in the CBA and the wage offered to the beneficiary is higher than the PWA [sic] issued.”

In the instant matter, the petitioner has submitted evidence to show that it gave proper notice of a CBA on the prevailing wage request. Additionally, the evidence shows that the petition, the posting notice, and the ETA Form 9089 all reflect a proffered wage of \$61,528 a year, which is the wage indicated in the CBA. The petitioner has consistently stated a proffered wage equal to the CBA wage, which the AAO notes is higher than the prevailing wage issued by the PWD.

Upon review of the record, the AAO has determined that the petitioner submitted a valid PWD. This portion of the director’s decision is withdrawn.

While the petitioner has overcome the director’s basis for denial, the petition is not approvable. We will remand the petition for the director’s consideration of the following additional issues: whether the petitioner has established the ability to pay the proffered wage.

As stated previously, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review by the AAO, the petitioner has not submitted sufficient evidence 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 regulation at 8 C.F.R. § 204.5(g)(2) states:

*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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. 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. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

In determining the petitioner’s ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between

the wage paid, if any, and the proffered wage.<sup>6</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the petitioner provided its 2005 basic financial statements. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Accordingly, the petitioner has failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

Additionally, the AAO notes that there are inconsistencies in the record with respect to the minimum requirements for the offered position. The ETA Form 9089 indicates that the minimum requirements to perform the offered position are an associate's degree in nursing and a proficiency in the use of medical tools, equipment, terms and terminologies. The posting notice dated May 1, 2007 indicates that an individual is required to be "...licensed and currently registered or otherwise duly authorized to practice as a Professional Nurse in New York State..." No specific educational requirements were listed; however, an annotation of "+Education, +Experience" is included.<sup>7</sup> The original PWD request indicates the following requirements:

College Degree Required:	YES – ADN BSn - Nursing
License Required:	YES – Registered Nurse
Special Skills or Other Requirements:	RN License or CGFNS Certificate

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

It is incumbent on 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.

<sup>6</sup> See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

<sup>7</sup> This annotation appears to indicate that the salary is based on education and experience.

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In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director of the Nebraska Service Center for further action in accordance with the foregoing and entry of a new decision.