

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]

B6

DATE: NOV 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:

[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.

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 remanded to the director.

The petitioner describes itself as a skilled nursing facility. 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 provide notice of the filing of an ETA Form 9089, Application for Permanent Employment Certification, in accordance with 20 C.F.R. § 656.10(d)(1) and failed to submit a valid prevailing wage determination in accordance with 20 C.F.R. § 656.40. The director also determined that the petitioner had not established that the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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).

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).

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).

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 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.*

The director determined that the Notice was not posted for ten business days, that the record did not contain evidence to establish that the notice was published in in-house media and that the record did

not contain evidence to establish where specifically in the facility the Notice was posted. The director also determined that the petitioner did not provide a copy of a prevailing wage determination.

On appeal, the petitioner submitted a letter dated February 23, 2009 from [REDACTED], president on the petitioner's letterhead stating that the petitioner does not have in-house media and describing the specific location of posting in the petitioner's employee break room. The petitioner has established that the petitioner did not have in-house media and where the Notice was posted. The petitioner has overcome this basis of the director's denial.

The petitioner also submitted evidence to establish that the petitioner is open 24 hours a day seven days a week. This evidence included a copy of the petitioner's California skilled nursing facility license requirements which include that the facility be open for business 24 hours a day seven days a week. See <http://hfcis.cdph.ca.gov/servicesAndFacilities.aspx> (accessed September 11, 2012).

The regulation at 20 C.F.R. § 656.10(d) provides in pertinent part:

- (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:
 - (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. Appropriate locations for posting notices of the job opportunity include locations in the immediate vicinity of the wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a). 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. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

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. 32244 (July 15, 1991).

In the past, the DOL and USCIS interpreted the requirement that the petitioner post the notice required by 20 C.F.R. § 656.10(d) for 10 consecutive business days to exclude Saturdays, Sundays, and federal holidays. However, as noted by the petitioner, BALCA recently concluded in its decision in *Matter of Il Cortile Restaurant* that the purpose of the notice requirement of 20 C.F.R. § 656.10(d)(1)(ii) can be fulfilled when a notice is posted for 10 consecutive days "when employees are on the worksite and [are] able to see the Notice of Filing." *Id.* at 4. BALCA also stated that "[a]s long as an employer has employees working on the premises on a Saturday, Sunday, or holiday, those days are business days for the purposes of complying with the Notice of Filing posting." *Id.* Although BALCA decisions are not binding on USCIS, the AAO has in the past found persuasive the DOL's definition of "business day" as used in 20 C.F.R. § 656.10(d)(1)(ii) for purposes of considering whether a posting notice complies with that regulation.

Consequently, the DOL changed its Frequently Asked Questions (FAQs) on December 21, 2010 for purposes of a Notice of Filing to state the following:

For purposes of posting the Notice of Filing for a permanent labor application, what does the Office of Foreign Labor Certification count as a "business day"?

OFLC has consistently interpreted "business day" to mean Monday through Friday, except for Federal holidays. However, where an employer is open for business on a Saturday, Sunday, and/or holiday, the employer may include the Saturday, Sunday and/or holiday in its count of the 10 consecutive business day period required for the posting of the Notice of Filing so long as the employer demonstrates that it was open for business on those days. Similarly, where an employer is not open for business any day, Monday through Friday, the employer should not include any such days in its count of the 10 consecutive business day period required for the posting of the Notice of Filing.

How does an employer demonstrate that it is open for business?

If an employer is requested on audit or otherwise to demonstrate that it was open for business on a Saturday, Sunday, and/or holiday at the time of posting, the employer must provide documentation which establishes that on those days: 1) its employees were working on the premises and engaged in normal business activity; 2) the worksite was open and available to its clients and/or customers, if applicable, as well as to its employees; and 3) its employees had access to the area where the Notice of Filing was posted.

See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#notefile1> (accessed September 11, 2012).

Accordingly, USCIS also concludes that the purpose of the notice requirement of 20 C.F.R. § 656.10(d)(1)(ii) can be fulfilled when an employer posts the notice for 10 consecutive days when employees are working at the worksite and are able to see the notice, even if those days are Saturdays, Sundays, or federal holidays. Conversely, if an employer is not open for business any day, including a weekday, these will not be counted as business days for purposes of complying with 20 C.F.R. § 656.10(d)(1)(ii). Finally, USCIS will use the guidance provided in the DOL's FAQs as stated above to determine whether a petitioner has established that it was open for business on any particular day for purposes of 20 C.F.R. § 656.10(d)(1)(ii).

The petitioner has established that it posted the notice for ten business days. Therefore, the petitioner has overcome this basis of the director's denial.

On appeal, the petitioner submitted a copy of a prevailing wage determination valid from July 10, 2007 to July 1, 2008. Therefore, the petitioner has provided a prevailing wage determination that meets the requirements of 20 C.F.R. § 656.40. The petitioner has overcome this basis of the director's denial.

The director also determined that the petitioner had failed to establish that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which for Schedule A petitions is the date the completed, signed petition and duplicate uncertified ETA Form 9089 are properly filed with USCIS. *See* 8 C.F.R. § 204.5(d).

Here, the priority date is July 31, 2007. The proffered wage as stated on the ETA Form 9089 is \$33.60 per hour (\$69,888 per year based on 40 hours per week).

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established March 15, 1995 and to currently employ 31 workers. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the ETA Form 9089, signed by the beneficiary on July 29, 2007, the beneficiary claims to have worked for the petitioner since March 30, 2007.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner demonstrated that it paid the beneficiary wages as shown in the table below:

- In 2007, the IRS Form W-2³ shows wages paid of \$68,247.15.
- In 2008, the IRS Form W-2 shows wages paid of \$69,754.83.

³ The AAO notes that the federal Employer Identification Number (EIN) on the 2007 and 2008 IRS Form W-2s [REDACTED] is inconsistent with the EIN indicated on the I-140 petition and the ETA Form 9089 [REDACTED]. However, the record contains evidence to establish that the EIN on the W-2s matches the EIN on the submitted copies of the petitioner's 2006 and 2007 federal tax returns. Further, the petitioner's 2006 and 2007 federal tax returns indicate that [REDACTED] belongs to [REDACTED] which owns 100% of the petitioner. The record also contains a letter dated July 27, 2007 from [REDACTED] Operations on the petitioner's letterhead indicating that [REDACTED] owns the petitioner. The evidence in the record establishes that the IRS Form W-2s are evidence of wages paid by the petitioner.

The petitioner did not pay the beneficiary the full proffered wage in 2007 and 2008. Therefore, the petitioner must establish that it can pay the difference between the wages paid to the beneficiary and the proffered wage in each relevant year.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term

tangible asset is a "real" expense.

River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The petitioner submitted its 2007 IRS Form 1120, U.S. Corporation Income Tax Return, on appeal and indicated that its 2008 IRS Form 1120 was not yet available.⁴ The petitioner’s tax return demonstrates net income for 2007 of \$217,175. Therefore, for the year 2007, the petitioner had sufficient net income to pay the difference between the wages paid to the beneficiary and the proffered wage.

The evidence submitted establishes that the petitioner has the continuing ability to pay the beneficiary the proffered wage. The petitioner has overcome this basis of the director’s decision.

However, beyond the decision of the director, the petitioner has failed to establish that the Notice posted by the petitioner contained the correct address of the appropriate Certifying Officer in accordance with 20 C.F.R. § 656.10(d)(1) and 20 C.F.R. § 656.10(d)(3) (iii). 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 Notice posted by the petitioner did not provide the address of the appropriate Certifying Officer. See 20 C.F.R. § 656.10(d)(3)(iii). The record contains a copy of the Notice posted by the petitioner from May 2, 2007 to May 12, 2007. At the top, it contains a notice that any person may provide documentary evidence to either the Alien Certification Office, CA Employment Development Department, P.O. Box 269070, Sacramento, CA 95826-9070 or the U.S. Department of Labor, Region IX, ETA Certifying Officer, P.O. Box 193767, San Francisco, CA 94119-3767. 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 Officer⁵ is:

United States Department of Labor
Employment and Training Administration

⁴ As of February 24, 2009, the date the appeal was filed, the petitioner’s 2008 federal tax return was not yet due.

⁵ See http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_3-3-05.pdf (accessed September 11, 2012).

The posting does not meet the requirements for posted notices to the employer's employees as set forth at 20 C.F.R. § 656.10(d)(3)(iii). Therefore, the petitioner has failed to establish that it provided Notice in accordance with 20 C.F.R. § 656.10(d)(1).

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. 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; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.