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

(b)(6)

DATE: SEP 2 7 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 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 an acute care 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

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[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).

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).

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 ETA Form 9089 were filed on July 25, 2007. The PWD in the record of proceeding initially submitted with the petition is dated February 1, 2007 with validity dates of February 1, 2007 to June 30, 2007. Accordingly, the PWD was not valid on the date of filing. On December 15, 2008, the director sent a Request for Evidence (RFE), which included a request for a valid PWD. Counsel responded on January 26, 2009 with a letter stating that the petitioner began its recruitment within the validity of the PWD by filing a notice of job posting on April 2, 2007. Counsel referenced 20 C.F.R. 656.40(4)(c), specifically stating that, "To use a SWA PWD, employers must file their applications or begin the recruitment required by Section 656.17(d) or 656.21 within the validity period specified by the SWA." On March 17, 2009, the director denied the instant petition due to the lack of a valid PWD. In the decision, the director stated that there is no required pre-filing recruitment for Schedule A occupations; therefore, for Schedule A purposes, employers must file their application for labor certification within the validity period of the PWD.

On appeal, counsel reasserts that the petitioner properly began its recruitment within the validity of the PWD. Counsel states, "It is the considered view of the petitioner that... an employer may either: a) file its application (Form ETA 9089) within the validity period of the prevailing wage or in the alternative, b) begin its recruitment efforts likewise within the validity period of the wage determination." Counsel states, "... even in petitions involving Schedule A occupations, it is necessary that a notice of filing as well as an attestation that meets regulatory requirements must have to be submitted as proof of the recruitment efforts of the employer. Therefore, contrary to the NSC Director's view, there are in fact recruitment components even in petitions involving Schedule A occupations."

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. 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").

On appeal, counsel also submitted two additional PWDs. The PWD dated July 24, 2007 indicates a prevailing wage of $30.21 with a validity period of July 24, 2007 through March 1, 2008. The PWD dated July 27, 2007 indicates a prevailing wage of $29.62 with a validity period of July 27, 2007 through January 1, 2008. No explanation was provided as to why the two PWDs were not submitted upon initial filing or in response to the director's December 15, 2008 RFE. The instant petition was filed on July 25, 2007. The PWD dated July 27, 2007 was not valid at the time of filing. The PWD dated July 24, 2007 was valid at the time of filing; however, the AAO notes that the prevailing wage listed is $30.21 per hour. The posting notice dated April 2, 2007 in the record of proceeding lists a salary of $29.62 per hour.[3] Therefore, neither of the additional PWDs submitted on appeal resolves the matter.

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

[3] ETA Form 9089 also lists the offered wage as $29.62 per hour. The petition lists the wages per week as $1,184.80, which is $29.62 per hour based on forty hours per week.

all the in-house media" used to distribute the Notice. *Id.*

In the instant case, a copy of the posting notice that was provided to the bargaining representative was submitted. As explained above, the Notice 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 expressed in the Notice was $29.62. The PWD submitted on appeal (dated July 24, 2007) reflected an increase in the hourly wage to $30.21. Based on the July 24, 2007 PWD, the Notice in the record is deficient as it lists a rate of pay less than the PWD rate of pay. Further, the petitioner also failed to address whether or not the Notice was published in any and all in-house media.

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 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,[4] the petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

The record before the director closed on January 26, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was the most recent return available. However, the record does not contain any annual reports, federal tax returns, or audited financial statements for the petitioner. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

The record does include a statement from [redacted] the petitioner's Chief Financial Officer. The letter, dated February 12, 2007, states that the petitioner employs 1,451 employees and had a gross revenue of $781,571,218 in its last fiscal year. The letter does not indicate the petitioner's fiscal year, and no additional evidence was provided to demonstrate the petitioner's ability to pay 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).

proffered salary on the priority date or subsequently. 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.)

Given the record as a whole and the petitioner's history of filing petitions, we find that USCIS need not exercise its discretion to accept the letter from Mr. [redacted] USCIS records indicate that the petitioner has filed over 150 Form I-140 immigrant petitions and Form I-129 nonimmigrant petitions since 1991. 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 the number of immigrant and nonimmigrant petitions filed by the petitioner, we cannot rely on a letter from Mr. [redacted] referencing the ability to pay a single beneficiary based on gross revenue in the fiscal year preceding the filing of the instant petition.

As we decline to rely on Mr. [redacted] letter, and no other financial documentation was submitted, the record does not demonstrate the petitioner's ability to pay the proffered wage.

Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

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.