

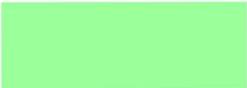


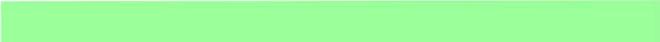
U.S. Citizenship  
and Immigration  
Services

(b)(6)



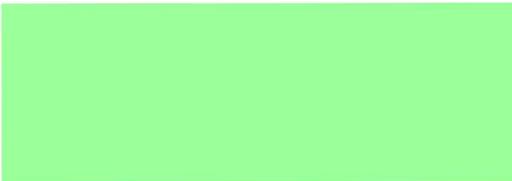
DATE: **DEC 19 2013**

Office: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(a)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a provider of senior housing and nursing services. It seeks to employ the beneficiary permanently in the United States as a staff registered nurse pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i)<sup>1</sup> The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089 or labor certification) accompanied the petition.<sup>2</sup>

On June 11, 2013, the director denied the petition, concluding that the petitioner had failed to comply with 20 C.F.R. § 656.10(d)(6) and 20 C.F.R. § 656.10(c) in that the rate of pay described in the notice of filing did not equal or exceed the prevailing wage.

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.<sup>3</sup> 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.

For the reasons set forth below, the AAO concurs with the director's decision to deny the petition, but finds that the fundamental issue underlying the director's concern with the petition is whether the petitioner offered full-time employment. The AAO also finds that the petitioner failed to establish that the beneficiary possessed the required experience in the job offered. 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. *See Spencer Enterprises, Inc. v. United States*, 299 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 at 145 (noting that the AAO reviews appeals on a *de novo* basis).

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<sup>1</sup>Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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 two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

<sup>2</sup> Counsel also requests that the AAO consider other petitions by the same petitioner which are claimed to have been denied for the same reasons as the instant case. In this proceeding, however, the AAO will consider only the petition which is the subject of this appeal.

<sup>3</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).

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Immigrant Petition for Alien Worker (Form I-140), must be “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.” A Schedule A occupation such as a professional nurse or physical therapist are occupations described in 20 C.F.R. § 656.5, which the DOL has already determined that there are not sufficient qualified and available United States workers. Therefore, an employer who seeks to sponsor a foreign worker is not required to obtain a certified ETA Form 9089 from the DOL prior to filing an employment-based petition with the United States 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)(3); see also 20 C.F.R. § 656.15. 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 [U.S. Citizenship and Immigration Services (USCIS)].” 8 C.F.R. § 204.5(d). In a Schedule A petition, the priority date is the date of filing the petition with USCIS. In this matter, the date is April 18, 2013. That is the date by which the petitioner must establish that the beneficiary possesses the education, training and experience required by the terms of the labor certification. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

The ETA Form 9089 must also be accompanied by a copy of a valid Prevailing Wage Determination (PWD) obtained in accordance with 20 C.F.R. §656.40 and 20 C.F.R. § 656.41 and evidence that the employer provided its U.S. workers with notice of the filing of an ETA Form 9089 (Notice) as set forth in 20 C.F.R. §656.10(d). See 20 C.F.R. § 656.15(b). Further, 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).

### **Full-Time Job Offer**

The employment-based petition and the ETA Form 9089 must establish that the petitioner is sponsoring a foreign worker based on a permanent full-time job offer. The attestations set forth at 20 C.F.R. § 656.10(c) and page 9 of the ETA Form 9089 require the employer to certify to the conditions of the employment including that the offered wage equals or exceeds the prevailing wage, that the job opportunity has been and is clearly open to any U.S. worker and that the job is for a full-time, permanent employment for an employer other than the alien.<sup>4</sup>

DOL guidance on this issue indicates that 35 to 40 hours per week is considered full-time employment. If the hours are less than 35, the employer must document that fewer hours are prevailing for full-time employment in the occupation and area of employment.<sup>5</sup>

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<sup>4</sup> See 20 C.F.R. § 656.3(1), which states that employment means “permanent, full-time work by an employee for an employer other than oneself.”

<sup>5</sup> See *Memo, Farmer, Admin. For Reg'l. Mngm't., Div. of Foreign Labor Certification*, DOL field Memo No. 48-94 (May 16, 1994).

In this matter, this issue also emerges in the PWD determinations. On the ETA Form 9141, Application for Prevailing Wage Determination submitted by the petitioner to the NPC for six separate worksite locations,<sup>6</sup> the petitioner indicated on Part D.a.3 that the basic number of hours of work per week would be 32. However, the NPC issued the prevailing wage as a yearly amount of \$56,576, \$48,485, \$50,794, \$50,794, \$39,416, and \$42,474, respectively. The determinations were based on the DOL's Occupational Employment Statistics (OES) level 1 wages for a registered nurse in the respective worksite locations. It is noted that the DOL's FAQs, (<http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (accessed November 25, 2013)) instruct "that an employer may request an hourly wage by entering 'Request Hourly Wage' in Job Duties block (D.a6) of the ETA Form 9141." The FAQ continues:

Please note: Due to the nature of some occupations where the norm for the occupation is not the standard 2080 hour work year, the Occupational Employment Statistics (OES) survey does not provide an hourly wage. In such instances, the NPWC will not be able to issue the requested hourly wage, as will be indicated in a note on the prevailing wage determination.

Having examined all of the ETA Form 9141s, the AAO notes that the petitioner failed to "Request Hourly Wage" on Part D.a.6. The petitioner also produced no evidence that it submitted any other supplemental information or alternate wage surveys to the NPC requesting a different formulation of the prevailing wage as is permitted in 20 C.F.R. §§ 656.40(g) and (h) or 20 C.F.R. § 656.41. Those regulations provide that if a prevailing wage is not covered by a Collective Bargaining Agreement (CBA), the NPC will consider wage information provided by the employer in making the prevailing wage determination and that an employer survey, detailing its procedures and methodology, can be submitted either initially or after the NPC issues a PWD based on the OES source. If the survey is not acceptable, an employer may provide supplemental information.

On appeal, counsel submits various materials related to full-time employment and asserts that, for the petitioner and for the health care industry generally, a 32-hour week is customary. Counsel submits a letter, dated July 9, 2013, from [REDACTED] the Executive Director of Human Resources for the petitioner. She states that the petitioner's Employee Handbook (also submitted) considers the full-time employment minimum of 30 hours per week but the petitioner put 32 hours as a minimum on the ETA Form 9141 to reflect full-time employment as this is the minimum needed for a nurse to be full-time and eligible for the company's benefits (minimum of 30 hours per week). The petitioner also submitted a copy of a print-out of "Regions Hospital." No location of this facility is listed on the document. It states that for purposes of benefit programs, full-time is considered to be 32-40 hours per week. A copy of a document from [REDACTED] located in [REDACTED] states that it considers full-time as sixty (60) hours in a fourteen day period. Counsel additionally submits materials discussing full-time employment with reference to the new health care reform law.

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<sup>6</sup>The petitioner filed 34 notices of job postings representing specific facilities in a three-state area where it operates.

As stated above, the employer must document that fewer hours are prevailing for full-time employment in the occupation and area of employment. Only two of the documents submitted on appeal ( ) referred to full-time employment as employers in the health care industry. ( ) failed to identify its location and neither identified registered nurses as the occupation they were referring to in discussing full-time employment. Given that the petitioner never identified any specific worksite where the beneficiary will work, as well as the fact that it filed 34 notices of job postings in a three-state area, the AAO finds that the petitioner has not sufficiently established that the job offered represents full-time employment.

### Notice of Posting/Rate of Pay

The requirements for the petitioner to provide evidence of its notice of posting<sup>7</sup> of the job opportunity, are set forth within the regulation at 20 C.F.R. § 656.10(d), which states in pertinent part:

(1) In applications filed under Section 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 shall 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

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<sup>7</sup> Fundamental to these provisions is the need to ensure that there are no qualified U.S. workers available for the position prior to filing. 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. 32,244 (July 15, 1991).

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.<sup>8</sup>

It is noted that the petitioner represented an hourly prevailing wage on all of its notice of job postings, rather than the annual prevailing wage determination as issued by the NPC, which were all based on a 2080 hour year (40 hour week) as set forth on the OES for a level 1 registered nurse. As set forth above, the petitioner also indicated on ETA Form 9141 that it had a 32 hour work-week. The director determined that because the petitioner had also represented on the ETA Form 9141 that it would only consider 32 as the number of work hours per week, in order to pay the annual prevailing wage of \$56,576, or \$1,088 per week, he divided \$1,088 by 32, which equals \$34 as the hourly wage that should have been listed on the notice of filings which originally used \$27.20 as the advertised wage. Therefore, the director concluded that the petitioner impermissibly posted a prevailing wage that was less than the prevailing wage determined by the NPC on the ETA Form 9141.

While the AAO does not disagree with the director's conclusion in determining that the notice of filing was flawed based on the representation that the hourly wage rate of \$27.20 was not actually based on the petitioner's proposed 32 hour week, which would require \$34 per hour in order to meet a yearly prevailing wage of \$56,576, the AAO notes that it may also be a case of a flawed prevailing wage determination based on the failure of the petitioner to demonstrate to the NPC that the prevailing wages for registered nurses in the area of employment should be based on an alternate wage source.

### **Experience**

<sup>8</sup> 20 C.F.R. § (d)(3) also states that the notice of the filing of an Application for Permanent Employment Certification must also :

- (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.

Beyond the director's decision, the petitioner failed to establish that the beneficiary possessed the required experience set forth in the terms of the labor certification.

The ETA Form 9089 requires an Associate's degree in Nursing and six months of experience in the job offered. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) requires that experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien. The record in this proceeding does not contain any employment verification letters. Therefore, the petitioner failed to establish that the beneficiary possessed the required experience as of the priority date.

The notice of posting provided by the petitioner was deficient and failed to comply with 20 C.F.R. § 656.10. Additionally, the petitioner failed to establish that it was offering full-time employment and that the beneficiary had the required experience as of 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.