

(b)(6)

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: **FEB 01 2013** 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:

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,

Rachel NiJorio
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The decision of the director is withdrawn.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.

The petitioner describes itself as an acute care 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 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 (1)(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

¹ 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).

(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.*

In the instant case, the director determined that 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 27, 2007. The PWD submitted with the Form I-140 has a determination date of February 1, 2007, with validity dates of February 1, 2007 through June 30, 2007. Accordingly, this PWD was not valid on the date of filing. However, the record of proceeding contains another PWD submitted into the record on February 26, 2009, as a second response to the director's request for evidence (RFE) of December

15, 2008. This PWD has a determination date of July 24, 2007, with validity dates of July 24, 2007 through March 1, 2008 and was not addressed by the director in his March 17, 2009 denial.

On appeal, counsel asserts that the petitioner met its requirement of filing the application or beginning the recruitment process when the PWD, which expired on June 30, 2007, was still valid. Counsel points out that the posting date of the Posting Notice was May 1, 2007; that this action was part of the recruitment process; and that it began during the validity of the PWD. Counsel also asserts that the submission of the additional PWD with an expiration date of March 1, 2008 meets the requirement as outlined by the director that the application must be filed with a valid PWD.

The AAO notes that one of the requirements to meet Schedule A eligibility is that the petitioner is required to submit a 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.

In this case, the AAO observes that the Posting was posted for more than 10 days, from May 1, 2007 to May 16, 2007 and that it contains all the information as prescribed by the relevant regulations. The location where the Posting was posted complies with the regulations, and the Posting was concluded on May 16, 2007, 72 days before filing the petition. Moreover, the AAO concludes that this Posting contained a "rate of pay" which was correct at the time of the Posting (i.e., \$29.62), which was the wage as determined on the PWD with a determination date of February 1, 2007, expiring June 30, 2007. Although the petitioner did not request a PWD specific to this petition to support the rate of pay listed on the Posting, the regulations do not require employers to take this step. *Compare with* 20 C.F.R. § 656.10(d)(4) (requiring non-Schedule A posting notices to include a rate of pay equaling or exceeding a PWD, which would already have been received from a state workforce agency). The regulation at 20 C.F.R. § 656.10(d)(6) only requires that the notice contain a job description and rate of pay.³

³ 20 C.F.R. § 656.10(d)(4), (6) provides:

(4) If an application is filed under Sec. 656.17, the notice must contain the information required for advertisements by Sec. 656.17(f), must state the rate of pay (which must equal or exceed the prevailing wage entered by the SWA on the prevailing wage request form), and must contain the information required by paragraph (d)(3) of this section.

...

(6) If an application is filed under the Schedule A procedures at Sec. 656.15, or the procedures for sheepherders at Sec. 656.16, the notice must contain a description of the job and rate of pay, and must meet the requirements of this section.

In this matter, the petitioner used the PWD with a determination date of February 1, 2007 to ascertain the appropriate rate of pay for the Posting. Therefore, the AAO concludes that the petitioner properly posted the Posting as prescribed by the regulations mentioned above.

Properly posting the Posting, however, will not necessarily lead to approval of the petition. 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. As noted above, 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").

Therefore, the posting requirement for Schedule A occupations, though necessary, is not a recruitment step, and the rate of pay on the Notice does not have to exactly match the wage listed on the PWD submitted with the petition. Furthermore, as explained above, the Posting 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 with a determination date of February 1, 2007, expiring June 30, 2007, reflected an hourly wage of \$29.62. The PWD with a determination date of July 24, 2007, expiring March 1, 2008, reflected an hourly wage of \$30.21. The proffered wage was \$32.71 per hour. The PWD with a determination date of July 24, 2007, was still valid when the petition was filed. As the proffered wage exceeds the PWD rate of pay, and the Posting more likely than not contained a rate of pay reflective of the prevailing wage at the time of the Posting, the petition meets the regulatory requirements.

The regulation at 20 C.F.R. § 656.15(b) requires an Application for Permanent Employment Certification form for Schedule A to include a PWD in accordance with § 656.40 and § 656.41.

The regulation at 20 C.F.R. § 656.40(c) states:

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.

In the instant case, the petitioner submits two PWD forms from the state of California Employment

Development Department. The PWD with a determination date of July 24, 2007 indicates that this prevailing wage is valid for filing applications and attestations through March 1, 2008. The record shows that the instant Schedule A application was filed on July 27, 2007. The PERM regulations expressly state that an employer must file its application within the validity period specified by the state workforce agency (SWA). In the instant case, the petitioner filed its Schedule A application within the validity period specified by the State of California Employment Development Department. Therefore, the petitioner did comply with the regulatory requirements with respect to the PWD validity period.

Beyond the decision of the director, the petitioner has failed to demonstrate that the beneficiary meets the requirements of 20 C.F.R. § 656.5(a)(2) and the petitioner has failed to meet the requirements of 20 C.F.R. § 656.15(c)(2).

According to 20 C.F.R. § 656.5(a)(2), aliens who will be permanently employed as professional nurses must (1) have received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS), (2) hold a permanent, full and unrestricted license to practice professional nursing in the state of intended employment, or (3) have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing.

According to 20 C.F.R. § 656.15(c)(2), an employer seeking a Schedule A labor certification for an alien to be employed as a professional nurse (Sec. 656.5(a)(2)) must file as part of its labor certification application documentation that the alien has received a Certificate from the CGFNS; that the alien holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment; or that the alien has passed the NCLEX-RN. Application for certification of employment as a professional nurse may be made only under 20 C.F.R. § 656.15(c) and not under 20 C.F.R. § 656.17.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

In the instant case, the petitioner has submitted a copy of the beneficiary's CGFNS. However, the date of the Certificate is May 21, 2008, but the priority date of the petition is July 27, 2007. Therefore, the evidence does not demonstrate that the beneficiary possessed a CGFNS Certificate as of the priority date of the petition.

In addition, the petitioner submitted a copy of the beneficiary's nursing license issued by the state of Vermont, while the offered position is in the state of California. Thus the petitioner has not submitted evidence that the beneficiary holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment.

The record does not include any evidence that the beneficiary has passed the NCLEX-RN administered by the National Council of State Boards of Nursing.

Therefore, the AAO will remand the case to the director to request evidence that the beneficiary had one of the above regulatory-prescribed credentials as of the priority date of the petition.

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.