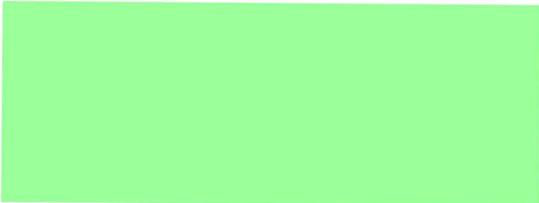


(b)(6)

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



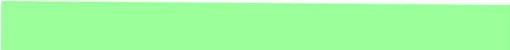
U.S. Citizenship  
and Immigration  
Services

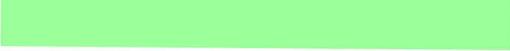


DATE: FEB 04 2014

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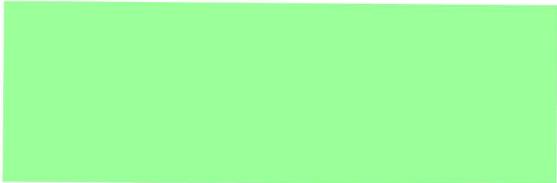
IN RE:

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 (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,

A handwritten signature in black ink that reads "Elizabeth McCormack".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed the director's decision and the Administrative Appeals Office (AAO) dismissed the appeal. The petitioner filed a motion to reopen and reconsider the AAO's decision. The AAO granted the motion and affirmed the dismissal of the appeal. The petitioner has now filed a second motion to reopen and reconsider the AAO's decision. The motion to reconsider will be denied; the motion to reopen will be granted. Upon review, the appeal will again be dismissed. The petition will remain denied.

The petitioner is an acute care hospital. It seeks to employ the beneficiary permanently in the United States as a registered nurse. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had failed to submit a valid prevailing wage determination in accordance with 20 C.F.R. § 656.40. The director denied the petition accordingly.

On April 9, 2009, the petitioner filed an appeal of the director's decision to the AAO. On September 27, 2012, the AAO dismissed the petitioner's appeal. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In its decision, the AAO found that the petitioner had failed to submit a valid prevailing wage determination in accordance with 20 C.F.R. § 656.40. The AAO additionally found that the petitioner had not established its ability to pay the proffered wage from the priority date under its authority for *de novo* review. The petitioner filed a motion to reopen and reconsider the AAO's decision and the AAO issued a decision on May 3, 2013 granting the motion. Upon review, the AAO again dismissed the appeal.

The AAO finds that the petitioner has not filed a proper motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part, that "[a] motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [USCIS] policy. A motion to reconsider ... must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision." The motion was not accompanied by arguments based on precedent decisions to establish that the decision was based on an incorrect application of law or policy. As a result, the motion to reconsider must be denied. The motion to reopen will be granted due to the submission of the petitioner's audited financial statements.

Concerning the petitioner's failure to submit a prevailing wage determination (PWD) valid for the time the petition was filed, counsel asserts that pursuant to 20 C.F.R. § 656.40(b), the wage rate set forth in the collective bargaining agreement (CBA) is considered the prevailing wage, and therefore, obtaining a PWD from the State Workforce Agency (SWA) is unnecessary.

The regulation at 20 C.F.R. § 656.15(b) provides,

(b) *General documentation requirements.* A Schedule A application must include:

(1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with §656.40 and §656.41.

Additionally, the regulation at 20 C.F.R. § 656.40(b)(1) provides,

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.

As stated in the previous AAO decisions, the regulations permit the CBA to establish the wage rate; however, nothing in the regulations provides for an exception to obtaining a PWD from the SWA. The DOL frequently asked questions (DOL FAQs) provide that the DOL may consider a CBA in issuing the PWD, not that a CBA takes the place of a PWD.<sup>1</sup> Although the DOL regulations cited by counsel state that DOL may use a SWA to determine a prevailing wage, the SWA does not take the place of a PWD from the DOL. As a result, the petition will remain denied on this basis.

The petitioner did submit a PWD; however, that PWD was valid only until June 30, 2007. The regulations require that the petitioner submit the petition within the validity period of the PWD. See 20 C.F.R. § 656.40(c). In this case, the petition and accompanying labor certification were filed on July 25, 2007. Accordingly, the PWD was not valid on the date of filing. Although counsel submitted two additional PWDs on appeal, one of the PWDs was not valid at the time of filing the immigrant visa petition, and the other PWD lists a prevailing wage higher than the offered wage. Counsel cites *Matter of Lei*, 22 I&N Dec. 113 (BIA 1998), for the premise that the BIA “has long frowned [sic] upon ready dismissal on technicalities.”<sup>2</sup> In any event, the BIA in *Matter of Lei* held that

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<sup>1</sup> What documentation should I submit in addition to ETA Form 9141 [Request for Prevailing Wage Determination] when the job opportunity is covered by a collective bargaining agreement (CBA)?

When a job opportunity is covered by a collective bargaining agreement, the employer must submit the following at the time it submits the ETA Form 9141:

1. A copy of the relevant portion of the CBA;
2. A letter, on letterhead, from the employer, stating the relevant section of the CBA, the CBA job title, and the appropriate wage; and
3. A letter, on letterhead, from the collective bargaining unit's (union) authorized representative, stating the relevant section of the CBA, the CBA job title, and the appropriate wage.

See [http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#Perm\\_Program](http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#Perm_Program) (accessed December 30, 2013).

<sup>2</sup> The decisions of the BIA are not binding upon these proceedings. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act; BIA decisions are not designated as precedent decisions in these proceedings.

the requirement that a motion to reopen and reconsider a deportation order be filed within 180 days could not be waived even though previous counsel failed to notify the beneficiary of the deportation order and despite the fact that counsel raised a claim for ineffective assistance of counsel. As a result, the decision does not stand for the proposition that regulations should not be applied as written. Counsel also cited *Fallen v. U.S.*, 378 U.S. 139 (1964), which considered the Rules of Criminal Procedure in determining that the indigent defendant had attempted to comply with the filing requirements but was prevented from doing so by a delay in mail service due to his incarceration. The Court held that deference should be given due to the extraordinary circumstances presented in the individual case and because the delays were outside of the defendant's control. The matter presented here does not involve circumstances outside of the petitioner's control. Instead, the petitioner made a choice not to obtain a PWD valid for the time the petition was filed. Therefore, the petitioner has not overcome the grounds for denial.

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>3</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 did not demonstrate its ability to pay the proffered wage from the priority date in 2007 onwards. The proffered wage stated on the labor certification is \$29.62 per hour (\$61,609.60 per year). The evidence previously submitted demonstrated that the petitioner paid the beneficiary a wage of \$36,258.88 in 2007, \$62,203.21 in 2008, \$63,139.53 in 2009, \$51,398.79 in 2010, and \$61,653.47 in 2011. The wages paid in 2007 and 2010 are less than the proffered wage.

With the instant motion, the petitioner submitted a statement from the beneficiary wherein she states that she worked only 10 months of the year in 2010, which is why her wages were less than the full proffered wage. Although the beneficiary may have been paid at the hourly rate as determined by the collective bargaining agreement, the petitioner must still prove its ability to pay the proffered wage for the entirety of the year regardless of actual hours worked by the beneficiary.

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<sup>3</sup> See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st 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).

The petitioner also submitted audited financial statements for 2011 and 2012 for [REDACTED] and Subordinate corporations.<sup>4</sup> These statements indicate sufficient net current assets to pay the proffered wage in 2010, 2011 and 2012, however, they do not indicate the petitioner's ability to meet its wage obligations in 2007.

The petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets. Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

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 motion to reopen is granted; the motion to reconsider is denied. The AAO's previous decision is affirmed. The petition remains denied.

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<sup>4</sup> The petitioner is listed as a wholly owned subsidiary of [REDACTED] along with 33 other entities.