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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUL 25 2014 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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,

Elizabeth McCormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center on March 17, 2009. On April 9, 2009, the petitioner appealed the director's decision, and the Administrative Appeals Office (AAO) dismissed the appeal on September 27, 2012. The petitioner filed a motion to reopen and reconsider our decision on October 29, 2012. On May 3, 2013, we granted the motion and affirmed our previous decision. On June 5, 2013, the petitioner filed a motion to reopen and reconsider our decision. On February 4, 2014, we denied the motion to reconsider, we granted the motion to reopen, and we affirmed our previous decision. The petitioner filed the instant motion to reconsider our decision on March 10, 2014. The motion to reconsider will be granted, our previous decision will be affirmed, and the petition will be denied.

The petitioner is an acute care hospital. It seeks to employ the beneficiary permanently in the United States as a registered nurse, 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. The priority date of the petition is the date the petition is properly filed with USCIS. 8 C.F.R. § 204.5(d). The priority date in this case is July 25, 2007.

Petitions for Schedule A occupations must contain 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). 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). Additionally, the petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date. 8 C.F.R. § 204.5(g)(2).

The director determined in his March 17, 2009 decision that the petitioner had failed to submit a valid PWD. In our September 27, 2012 decision, we determined that the petitioner had failed to submit a valid PWD, and that the petitioner had not established its continuing ability to pay the proffered wage from the priority date.[1] Our decisions dated May 3, 2013 and February 4, 2014[2] also

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[1] 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).

[2] We note an error in our decision dated February 4, 2014, at footnote number two. The accompanying text reads that "[c]ounsel cites *Matter of Lei,* 22 I&N Dec. 113 (BIA 1988) for the

determined that the petitioner had failed to submit a valid PWD, and that the petitioner had not established its continuing ability to pay the proffered wage from the priority date.

We will review each issue below.

Prevailing Wage Determination

The regulation at 8 C.F.R. § 103.5(a)(3) provides:

> *Requirements for a motion to reconsider.* 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 Service policy. A motion to reconsider a decision on an application or petition 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 to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the AAO made an erroneous decision through misapplication of law or policy, and that the decision was incorrect based on the evidence of record at the time of the initial decision. Specifically, on motion, the petitioner asserts that we misconstrued the regulations regarding PWDs. Counsel states that pursuant to 20 C.F.R. § 656.40(b), the wage rate set forth in the collective bargaining agreement (CBA) covering the proffered job[3] 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, in part:

> (b) *General documentation requirements.* A Schedule A application must include:
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> (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 provides, in part:

> (a) *Application process.* **The employer must request a PWD from the NPC**, on a form or in a manner prescribed by OFLC. Prior to January 1, 2010, the SWA having

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premise that the BIA 'has long frown [sic] upon ready dismissal on technicalities.'" Footnote two states that "[t]he decisions of the BIA are not binding on these proceedings. . .BIA decisions are not designated as precedent decisions in these proceedings." These statements are incorrect and are withdrawn. Nevertheless, the BIA did not state in *Matter of Wei* that USCIS should interpret regulations more broadly than they are written, nor has counsel cited DOL precedent, policy or regulation indicating that in cases where there is a CBA, a PWD does not need to be filed.

[3] The petitioner submitted a copy of the CBA between [redacted] and the [redacted] which covers the proffered job.

> jurisdiction over the area of intended employment shall continue to receive and process prevailing wage determination requests in accordance with the regulatory provisions and Department guidance in effect prior to January 1, 2009. On or after January 1, 2010, the NPC shall receive and process prevailing wage determination requests in accordance with these regulations and with Department guidance. The NPC will provide the employer with an appropriate prevailing wage rate. The NPC shall determine the wage in accordance with sec. 212(t) of the INA. Unless the employer chooses to appeal the center's PWD under §656.41(a) of this part, it files the Application for Permanent Employment Certification either electronically or by mail with the processing center of jurisdiction and maintains the PWD in its files. The determination shall be submitted to the CO, if requested.
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> (b) *Determinations.* The National Processing Center will determine the appropriate prevailing wage as follows:
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> (1) 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.[4]

(Emphasis added). The regulations require an employer to obtain a PWD, without exception. This requirement is expressed in the instructions to the ETA Form 9089, which state at Section F:

> Before you can complete this section of the form, you must secure a Prevailing Wage Determination (PWD) from the State Workforce Agency (SWA) responsible for the state in which the work will be performed.

http://www.foreignlaborcert.doleta.gov/pdf/9089inst.pdf (accessed July 7, 2014).

Thus, while the wage rate in the CBA determines the prevailing wage in this case, the CBA does not create anexception to obtaining a PWD. As noted above, the DOL has pre-certified the shortage of available United States workers in Schedule A cases. 20 § C.F.R. § 656.5(a) The uncertified labor certification application is filed directly with USCIS along with the Form I-140 petition. *See* 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i); *see also* 20 C.F.R. § 656.15. USCIS must follow DOL regulations in adjudicating these petitions.

With the initial petition, the petitioner submitted a PWD dated February 1, 2007, with validity dates of February 1, 2007 to 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

[4] Paragraphs (e) and (f) of 20 C.F.R. § 656.40 pertain to computing prevailing wages for institutions of higher education, research entities, and professional athletes.

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.

The petitioner failed to submit a valid PWD. Therefore, the petitioner has not overcome the grounds for denial.[5] The petition will remain denied on this basis.

Ability to Pay the Proffered Wage

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 of July 25, 2007. The proffered wage stated on the labor certification is $29.62 per hour ($61,609.60 per year).

On motion, the petitioner submitted no evidence to establish that it had the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the petitioner has not established its continuing ability to pay the proffered wage.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden.

ORDER: The motion to reconsider is granted. The decision of the AAO dated March 10, 2014 is affirmed. The petition is denied.

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[5] The regulation at 8 C.F.R. § 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 103.5(a)(1)(iii)(C) states that motions must be:

> [a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date and status or result of the proceeding.

In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C).