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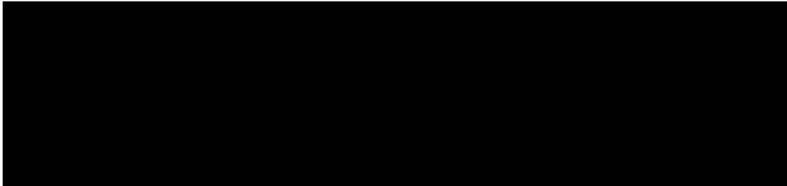
FILE: WAC 05 140 53003 Office: CALIFORNIA SERVICE CENTER Date: JUL 16 2007

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a hospital. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. The petitioner submitted a Form ETA 9089, Application for Permanent Employment Certification. The director determined that the petitioner had failed to comply with the regulatory requirements with regard to paying the prevailing wage and denied the petition accordingly.

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.

As set forth in the director's December 14, 2005 denial, the only issue in this case is whether or not the petitioner offered the correct prevailing wage in compliance with the requirements of the regulations.

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.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed 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." 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 [Citizenship and Immigration Services (CIS)]." 8 C.F.R. § 204.5(d). Here, the priority date is April 18, 2005.

The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

The regulation at 20 C.F.R. § 656.15 states in pertinent part:

- (a) *Filing application.* An employer must apply for a labor certification for a *Schedule A* occupation by filing an application in duplicate with the appropriate DHS office, and not with an ETA application processing center.
- (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.

- (2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as proscribed in § 656.10(d).

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. The relevant evidence in the record includes the initial posting notice submitted with the initial petition, Form ETA 750, the subsequent posting notice submitted with the Form 9089² signed by ██████████ Director, Human Resources, and a Prevailing Wage Request from the state of California Employment Development Department. The posting notice states that the rate of pay is \$21.40 “per hour (12 hr. shift with overtime \$24.95).” The state of California EDD prevailing wage determination states that the prevailing wage for a registered nurse based on an OES All industries survey source for the survey area of Los Angeles, Long Beach, metropolitan statistical area is \$23.26 an hour. The Form 9089, Section F, Prevailing Wage Information, indicates that the prevailing wage is \$23.26, while Section G, Wage Offer Information, states that the offered wage is \$21.40 an hour.

On appeal, counsel acknowledges that the prevailing wage as determined by the state of California EDD is \$23.26 per hour. Counsel notes that the wage listed on the notice posted from March 1, 2005 to March 16, 2005 states that the proffered wage is \$21.40 an hour or \$24.95-12 hour shift. Counsel states that the petitioner's position of registered nurse works a 12 hour shift. Counsel states that consequently, the wages received by the beneficiary and all other entry level registered nurses is at least \$24.95 per hour as they are required to work 12 hour shifts. Counsel states that the petitioner has always complied with the Department of Labor requirements and has paid all employees the prevailing wage or higher.

CIS has the authority to review the petitioner's proffered wage for compliance with 20 C.F.R. § 656.15, and, thus, with DOL's prevailing wage rates. *See* 20 C.F.R. § 656.40 and § 656.41. Further, pursuant to 20 C.F.R. § 656.10 (c) (1), the petitioner must certify that the proffered wage equals or exceeds the prevailing wage. DOL maintains a website at www.ows.doleta.gov which provides access to an Online Wage Library (OWL), www.flcdcenter.com. OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically.³ The prevailing wage rates are broken down into four skill levels. All employer applications for a prevailing wage determination are initially considered an entry or level I wage. The employers' requirements for experience, education, training and special skills are compared to those generally required for an occupation and are used as indicators that a job opportunity is for a Level II, III or IV worker. The occupation and corresponding job description indicate that it is a Level I position because the proffered position of registered nurse does not require additional training or specializations other than nursing duties delineated by the DOL's *Occupational Outlook Handbook* at page 269. OWL reports that for 2005, the

¹ 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).

² In a request for further evidence dated September 12, 2005, the petitioner was instructed to submit the Form 9089, rather than the Form ETA 750 in compliance with regulatory changes instituted by the Department of Labor (DOL) with regard to the labor certification process, effective March 28, 2005.

³ The city, state, and county of the employment location must be known in order to identify the prevailing wage rate.

year of the petition's priority date, the prevailing wage rate for a Level 1 nursing position in Los Angeles County, Long Beach, Los Angeles metropolitan area, is \$23.26 an hour or \$48,381 per year, figures higher than the proffered wage of \$21.40 per hour. Thus, the proffered wage offered by the petitioner does not meet the prevailing wage rate.

Counsel's assertion on appeal that the petitioner pays the beneficiary and all other entry level registered nurses at least \$24.95 per hour as they are required to work 12 hours shifts is not persuasive. First, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Second, the posting notice submitted to the record does not establish that the beneficiary will receive a salary of \$24.95 per hour. The notice states that the rate of pay is \$21.40 per hour. The phrase that follows the rate of pay statement, namely, "12 hour shift with overtime \$24.95" does not establish that the beneficiary and all other entry level registered nurses work a regular twelve hour shift or that the 12 hour shift is paid at the rate of \$24.95 per hour. This phrase could be interpreted to mean any 12 hour shift with overtime would be paid at the rate of \$24.95 per hour for the entire shift only if overtime is worked or that the nurses are paid \$21.40 for all hours worked in a single shift up to 12 hours and \$24.95 per hour thereafter.⁴ Finally, the Form 9089 contains no further clarification of the proffered wage of \$21.40, as to regular 12 hour shifts and corresponding rates of pay.

Thus, the petitioner has not established that its proffered wage as stipulated on Form 9089 is equal to the prevailing wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented submitted by the petitioner that demonstrates that the petitioner is not offering the beneficiary the prevailing wage as of the day the Form 9089 was submitted to Citizenship and Immigration Services (CIS). The evidence submitted does not establish that the petitioner has complied with the DOL regulatory guidance with regard to paying the beneficiary the prevailing wage.

The AAO also notes that the prevailing wage determination is dated June 7, 2005 and that the priority date is April 18, 2005. PERM regulations require that the prevailing wage determination be over 90 days old and less than one year old on the date of filing. *See* 20 C.F.R. § 656.40(c). Further, the AAO notes that the Form 9089 is not signed by the preparer.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate evidence and fee.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

⁴ The AAO notes that the pre-PERM regulations at 20 C.F.R. § 656.40(a)(2)(i) stated that the proffered wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages. However, the new PERM regulations do not contain such a provision. Thus the petitioner has to establish it is paying the full prevailing wage to the beneficiary. It is further noted that the proffered wage of \$21.40 is not within five per cent of the prevailing wage of \$23.26, and thus the petition would have failed even under the previous regulatory guidance.

