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**U.S. Department of Homeland Security**  
U.S. Citizenship and Immigration Services  
*Office of Administrative Appeals* MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**

**PUBLIC COPY**

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[REDACTED]

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date:

LIN 06 190 51235

SEP 11 2009

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

**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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner filed a motion to reopen/reconsider. The director granted the motion to reopen/reconsider and determined that the grounds for denial had not been overcome and affirmed his previous denial. The matter 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. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 or labor certification) accompanied the petition. The director determined that the petitioner had failed to file the preference visa petition within the validity period of the prevailing wage determination and denied the petition accordingly.

On appeal, the petitioner, through former counsel, maintains that the petitioner's petition was consistent with the applicable requirements and that the petition should be approved.<sup>1</sup> Former counsel additionally indicated that a brief and/or additional evidence would be submitted to the AAO within 30 days. More than eighteen months later, nothing further has been received. This decision will be rendered on the record as it currently stands.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees.

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."

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<sup>1</sup> 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 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 [United States Citizenship and Immigration Services (USCIS)].” 8 C.F.R. § 204.5(d). Here, the priority date is June 1, 2006.

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 Department of Labor 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. Therefore these regulations apply to this case because the filing date is June 1, 2006.

The sole issue on appeal in this matter is whether the petitioner filed the Form I-140 within the validity period of the state prevailing wage determination issued by the State Workforce Agency (SWA) applicable to the certified position in compliance with the applicable regulations found at 20 C.F.R. Part 656.

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 prescribed in § 656.10(d).

The regulations at 20 C.F.R. § 656.40 state in relevant part:

(a) *Application process.* The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer....

(b) *Determinations.* The SWA determines the prevailing wage as follows:

(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. . . .

(c) 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 application or begin the recruitment required by §§656.17(d) or 656.21 within the validity period specified by the SWA.

The petitioner did not provide a prevailing wage determination with the initial filing. In response to the director’s request for evidence issued on December 8, 2006, the petitioner provided a SWA PWD from the California Employment Development Department that was valid from the determination date of June 14, 2006 until the expiration date of the validity period, which was designated as “the calendar year in which issued” or December 31, 2006. As noted above, the petitioner filed the I-140 on June 1, 2006 prior to receipt of the prevailing wage. The prevailing wage is stated as \$25.60 per hour, which is also reflected on the petitioner’s ETA Form 9089, Part F. The offered wage for the certified position is designated on Part G of the ETA Form 9089 as \$26.40.

The director denied the petition on August 27, 2007, concluding that since the filing date of the I-140 did not fall with the date range of the validity period of the SWA prevailing wage determination, the petition may not be approved.

On motion, former counsel asserts that whether the petition was filed within the validity period of the PWD should not be relevant because the prevailing wage remained the same on May 30, 2006 and on June 14, 2006. Counsel asserts that the *Memorandum by William R. Yates, Associate Director of Operations*, “Current Processing of Pending Forms I-140 for a Schedule A/Group I or II Occupations Missing Evidence of Compliance with U.S. Department of Labor (DOL) Notification/Posting Requirements and Guidance Effective March 28, 2005 pursuant to new DOL regulations at 20 CFR Part 656 Regarding the New Process for Blanket Labor Certification for Schedule A,” HQOPRD 70/8.5 (September 23, 2005), supports approval of the petition because it emphasizes that the focus is on the prevailing wage at the time of recruitment and not necessarily that the dates of the determination should determine the parameters of filing the visa petition. Former counsel further claimed that the petitioner began its recruitment of the job position during the validity period as specified by the SWA pursuant to 20 C.F.R. § 656.40(c).

On December 21, 2007, the director granted the motion to reopen/reconsider. The director concluded that the grounds for denial had not been overcome and the prevailing wage determination was not obtained in compliance with 20 C.F.R. § 656.40.

On appeal, former counsel reiterates that the Yates Memo directs Service policy to review the prevailing wage determination at the time of recruitment and that the petitioner has met those requirements.

The Yates Memo is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely offered as guidance.<sup>2</sup> Nor does it contradict the PERM regulations, which became effective on March 28, 2005. *See also* 20 C.F.R. § 656.5. It provides:

We have determined there are not sufficient United States workers who are able, willing qualified, and available for the occupations listed below on Schedule A and the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. An employer seeking a labor certification for an occupation listed on Schedule A may apply for that labor certification under § 656.15.

As Schedule A occupations are precertified, no recruitment is required and counsel's assertion would not apply to this matter. In this case, the AAO concurs with the director's decision to deny the I-140 because the application was not filed within the validity period of the prevailing wage determination. The validity period of the SWA PWD was from June 14, 2006 to December 31, 2006. The petition was filed thirteen days earlier, which is not within this period of time. Therefore, the petitioner was not in compliance with 20 C.F.R. § 656.40.

Based on the foregoing, the petition is not eligible for approval. 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.

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<sup>2</sup>*See also, Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).