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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

[redacted]

B6

DATE: AUG 20 2012 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 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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (director). The case is currently before the Administrative Appeals Office (AAO) on appeal. The director's decision to deny the petition will be affirmed and the appeal will be dismissed.

The petitioner describes itself as a health care service provider. It seeks to permanently employ the beneficiary in the United States as a physical therapist. 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 petition contains a blanket labor certification application pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the U.S. Department of Labor (DOL) has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

Based on 8 C.F.R. § 204.5(a)(2) and (l)(3)(i), an applicant for a Schedule A position must file a Form I-140, Immigrant Petition for Alien Worker accompanied by an application for Schedule A designation. The priority date of the petition is the date the petition is properly filed with U.S. Citizenship and Immigration Services (USCIS). 8 C.F.R. § 204.5(d).

The Schedule A application must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer's completion of an ETA Form 9089, Application for Permanent Employment Certification, and evidence that the employer has provided appropriate notice of filing the labor certification (Posting) to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d). The petitioner must also obtain a prevailing wage determination (PWD) in compliance with 20 C.F.R. § 656.40. Also, according to 20 C.F.R. § 656.15(c)(2), aliens who will be permanently employed as professional nurses must have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, hold a full and unrestricted license to practice professional nursing in the state of intended employment, or have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

The instant petition was filed with USCIS on August 17, 2007.[2] The petition states that the weekly wage to be paid to the beneficiary is $1,240.00 ($31.00 per hour). The ETA Form 9089 states that the prevailing wage is $26.64 per hour and the offered wage is $31.00 per hour.

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[1] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

[2] The director erroneously states in the final decision that the petition was filed on October 5, 2007. The director's error does not affect the outcome of this appeal.

On January 23, 2009, the director issued a request for evidence (RFE), instructing the petitioner to submit a PWD that was valid on the August 17, 2007, petition filing date. On March 13, 2009, the petitioner submitted a computer printout relating to its "Request for Prevailing Wage Form" dated July 31, 2007.

On April 22, 2009, the director concluded that the computer printout submitted did not meet the applicable regulatory requirements and denied the petition.

In order for the petition to be approved, the petitioner must submit a PWD that 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) states that a Schedule A application must be filed within the validity period of the PWD. This is in contrast to the PERM labor certifications, which only requires the PWD to be valid during the recruitment period for the offered position. *Id.* However, since Schedule A occupations are designated by the DOL as shortage occupations, no recruitment is conducted as part of the Schedule A application process. The Posting requirement is not a recruitment step. In the overview of its PERM regulation, the DOL states 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." 69 Fed. Reg. 77326, 77338 (Dec. 27, 2004).

Therefore, for Schedule A applications, the PWD must be valid when the petition and accompanying ETA Form 9089 are filed with USCIS. In the instant case, the initial petition was supported by only a computer printout of the petitioner's request for a Prevailing Wage Determination, but no evidence that the determination was actually made or was valid at the time the current petition was filed on August 17, 2007.[3] A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

For the reasons set forth above, the petitioner failed to submit a PWD that would permit an approval of the instant petition and accompanying Schedule A application.

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. The petition is denied.

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[3] It is noted that the petitioner filed a second petition for this beneficiary on August 27, 2009, under receipt number SRC 09 252 50707. That petition was supported by a PWD issued on May 27, 2009, and valid for 90 days. That petition was approved on September 26, 2009. Since that PWD was not valid at the time the current petition was filed, it does not satisfy the regulatory requirements for the current petition. The September 26, 2009, approval of the second petition will not be disturbed.