

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



B6

DATE: **DEC 17 2012** OFFICE: NEBRASKA SERVICE CENTER

FILE:

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:

SELF-REPRESENTED

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the immigrant visa petition. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner asserts that the director and the AAO made an erroneous decision through misapplication of law or policy.¹

The petitioner describes itself as a health care/skilled nursing business. It seeks to permanently employ the beneficiary in the United States as a registered nurse. 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).²

The director denied the petition because the petitioner failed to submit a valid prevailing wage determination (PWD) in accordance with 20 C.F.R. § 656.40. On appeal, the AAO also noted that the petitioner failed to provide notice of the filing of an ETA Form 9089, Application for Permanent Employment Certification (Notice), in accordance with 20 C.F.R. § 656.10(d)(1).

The record shows that the appeal is properly filed, timely, and makes an 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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

The petition is for 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

¹ It is noted that an attorney who is currently on the list of suspended and expelled practitioners and suspended by the State of Utah represents the petitioner. Therefore, the AAO does not recognize counsel in this proceeding.

² 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), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 (1)(3)(i); *see also* 20 C.F.R. § 656.15.

If the Schedule A occupation is a professional nurse, the petitioner must establish that the beneficiary has a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). *See* 20 C.F.R. § 656.5(a)(2).

Petitions for Schedule A occupations must also contain evidence establishing that the employer provided its U.S. workers with Notice as prescribed by 20 C.F.R. § 656.10(d), and a valid 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).

For the Notice requirement, the employer must provide notice of the filing of an ETA Form 9089 to any bargaining representative for the occupation, or, if there is no bargaining representative, by posted notice to its employees at the location of the intended employment. *See* 20 C.F.R. § 656.10(d)(1).

The regulation at 20 C.F.R. § 656.10(d)(3) states that the Notice shall:

- (i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
- (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
- (iii) Provide the address of the appropriate Certifying Officer; and
- (iv) Be provided between 30 and 180 days before filing the application.

Notices for Schedule A occupations must also contain a description of the job offered and the rate of pay. *See* 20 C.F.R. § 656.10(d)(6).

In cases where there is no bargaining representative, the Notice must be posted for at least 10 consecutive business days, and it must be clearly visible and unobstructed while posted. 20 C.F.R. § 656.10(d)(1)(ii). The Notice must be posted in a conspicuous place where the employer's U.S. workers can readily read it on their way to or from their place of employment. *Id.* In addition, the Notice must be published "in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the

employer's organization." *Id.* The satisfaction of the Notice requirement may be documented by "providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media" used to distribute the Notice. *Id.*

In the instant case there is no evidence in the record of a bargaining representative for the occupation. The record contains two Notices, both of which are deficient. The first Notice was posted from February 1, 2005 to June 1, 2005, and was therefore not completed between 30 and 180 days before the filing date of the petition. This Notice also failed to provide the address of the appropriate Certifying Officer. The second Notice was posted from August 7, 2006 to September 1, 2006, and was therefore completed during the required timeframe. However, this Notice also failed to provide the address of the appropriate Certifying Officer.⁴

Additionally, the petitioner failed to submit a PWD that meets the requirements of 20 C.F.R. § 656.40. 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). The instant petition and ETA Form 9089 were filed on October 30, 2006. The PWD in the record of proceeding is dated October 27, 2005 with validity dates of October 27, 2005 to October 26, 2006.⁵ Accordingly, the PWD was not valid on the date of filing.

In the motion to reconsider, the petitioner asserts that it started recruitment while the PWD was valid and therefore the petition met the requirements of 20 C.F.R. § 656.40. The petitioner has mistaken the role of the Notice, incorrectly deeming it recruitment. In order for the petition to be approved, the petitioner must submit with the petition a PWD that fully 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) specifically states that a Schedule A application must be filed within the validity period of the PWD. This is in contrast to the regulatory guidance for non-Schedule A labor certifications, which requires the PWD to be valid during the *recruitment* period for the offered position or on the date of filing. *Id.* Since Schedule A occupations are designated by the DOL as shortage occupations, no recruitment is conducted as part of the Schedule A application process. *See* 69 Fed. Reg. 77326, 77338 (Dec. 27, 2004) (noting 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").

The petitioner also states that the beneficiary was being paid in excess of the prevailing wage rate at the time the petition was filed and therefore was eligible at the time of filing. The actual wage being paid to the beneficiary at the time of filing of the instant petition is not at issue in these proceedings.

⁴ The prior decision of the AAO incorrectly stated that the record did not contain a Notice completed during the required time frame. As noted above, the record does contain a Notice that was completed between 30 and 180 days before filing the petition, however this Notice does not meet the other requirements of 20 C.F.R. § 656.10(d)(1)(ii).

⁵ The petitioner submitted an additional PWD on appeal to the AAO with validity dates of June 18, 2007 to June 17, 2008. This PWD was also not valid at the time of filing of the instant petition.

What is at issue is whether or not the petitioner had a valid PWD at the time of filing petition. In the instant case, the petitioner's PWD expired prior to the filing date and therefore the petitioner did not submit a PWD in accordance with 20 C.F.R. § 656.40.

The petitioner does not address the deficiencies in the Notice that were noted in the prior AAO decision. Therefore, it remains that the petitioner failed to provide Notice in accordance with 20 C.F.R. § 656.10(d)(1).

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 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'r 1988).

The director properly denied the petition because the petitioner failed to provide Notice in accordance with 20 C.F.R. § 656.10(d)(1) and failed to submit a valid PWD in accordance with 20 C.F.R. § 656.40.

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 appeal is dismissed.