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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

DATE: OFFICE: TEXAS SERVICE CENTER

FILE:

APR 05 2013

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:

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 employment-based preference visa petition was initially approved by the Director, Texas Service Center (the director). In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner describes itself as a nursing home. 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).¹

The director denied the petition because the Schedule A occupation listed by the petitioner on the ETA Form 9089, Application for Permanent Employment Certification did not require any education, training or experience and thus did not qualify for consideration under section 203(b)(3)(A) of the Act.

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.² On appeal, counsel submits a brief and copies of documentation already in the record.

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

² 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).

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 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.*

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 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.

Based on 8 C.F.R. § 204.5(a)(2) and (1)(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 July 10, 2007, which is the date the petition was filed with U.S. Citizenship and Immigration Services (USCIS). *See* 8 C.F.R. § 204.5(d).

In support of the immigrant visa petition, former counsel³ submitted an ETA Form 9089, dated May 29, 2007, which states that the offered position of registered nurse has the following minimum requirements:

- H.4. Education: No box checked.
- H.5. Training: None required.
- H.6. Experience in the job offered: None required.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None.

On December 21, 2009, the director issued a Notice of Intent to Revoke (NOIR) indicating that the ETA Form 9089 submitted in support of the immigrant visa petition was deficient in that it did not have requirements that would render the position eligible as a professional or skilled worker under

³ Counsel who filed the immigrant visa petition, [REDACTED] was replaced by current counsel, [REDACTED] in response to a notice of intent to revoke (NOIR) and will be referred to as former counsel.

section 203(b)(3)(A) of the Act. In response to the NOIR, counsel and the petitioner submitted a copy of an ETA Form 9089, signed by the beneficiary on June 5, 2006 which was submitted in support of a previously filed and denied immigrant visa petition. The petitioner states that the June 5, 2006 ETA Form 9089 was the labor certification submitted with the instant case and that it reflected the requirements of a professional education in nursing and 24 months of experience in the proffered position. The June 5, 2006 ETA Form 9089 listed the position as a staff nurse⁴ and listed a prevailing wage which expired on September 30, 2006, more than 180 days prior to the filing of the immigrant visa petition. The petitioner stated in response to the NOIR that the position of a registered nurse necessarily requires an education in nursing, a license to practice nursing in the State of New York and experience in the proffered position. However, the Form ETA 9089 labor certification submitted with the instant immigrant visa petition necessarily precludes the immigrant visa petition from consideration under section 203(b)(3)(A) of the Act, in that the position classification requires either a Bachelor's degree or foreign equivalent to be classified as a professional or two years experience or training to be classified as a skilled worker.

On appeal, counsel contends that the job duties listed on the ETA Form 9089 necessarily dictate minimum education, training and/or other requirements that would meet section 203(b)(3)(A) of the Act and that, as stated in the Adjudicator's Field Manual (AFM), the immigrant visa petition should not have been denied based solely on its failure to list the minimum requirements on the ETA Form 9089. The AAO disagrees. The Form ETA 9089 is deficient in critical components other than the failure to list the minimum requirements for the position.

In this case, the labor certification indicates that there are no education, training or experience requirements for the proffered position. However, the petitioner requested the professional or skilled worker classification on the Form I-140. The petition must be accompanied by a labor certification that supports the petition classification. It appears that former counsel used a copy of a previously filed labor certification, inked-out the previous labor certification requirements and failed to state new requirements. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. 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). If the AAO were to accept the previous Form ETA 9089, then the prevailing wage stated therein is expired and the petition would be denied for failure to file the Form I-140 with a properly completed ETA Form 9089, including a valid state prevailing wage determination. *See* 20 C.F.R. § 656.15. If the AAO were to accept the new Form ETA 9089, it lists a new prevailing wage but no education, experience or training requirements. Thus the petition is not supported by a labor certification application as required by the classification under Section 203(b)(3)(A)(i) of the Act and by the Schedule A designation.

⁴ The position describes duties identical to those of a registered nurse.

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Beyond the decision of the director, the petitioner failed to establish that it provided notice to the 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.

Petitions for Schedule A occupations must contain evidence establishing that the employer provided its U.S. workers with notice of the filing of an ETA Form 9089 (Notice) as prescribed by 20 C.F.R. § 656.10(d), and 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).

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). Evidence in the record indicates that there is an agreement between the petitioner and the New York State Nurse Association (NYSNA). *See Agreement Between New York State Nurse Association and* [REDACTED]

The regulation at 20 C.F.R. § 656.10(d)(1) states that, if there is a bargaining representative, as in the instant case:

- (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment. Documentation may consist of a copy of the letter and a copy of the *Application for Permanent Employment Certification* form that was sent to the bargaining representative.

There is no evidence in the record to establish that notice was given to the bargaining representative or that there is no bargaining representative to which notice could be given. Further, the petitioner has also failed to establish that the notice to employees meets the other requirements set forth at 20 C.F.R. § 656.10.

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, the Notice in the record is deficient as it failed to provide the address of the appropriate Certifying Officer.⁵ Moreover, the Notice appears to be altered to reflect that it was posted from March 8 to March 21, 2007 by erasing the last number of the typed year and handwriting in the year 2007. There is no explanation for this alteration in the record. Thus, the AAO does not accept that the notice was posted between 30 and 180 days of filing the application as required by regulations. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner also failed to indicate whether notice was provided in in-house media, either through electronic or printed correspondence and failed to submit copies of such in-house media.

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 revoked the approval of the petition because the requirements on the ETA Form 9089 failed to comply with requirements for classification under section 203(b)(3)(A) of the Act. Beyond the decision of the director, the petitioner failed to provide Notice in accordance with 20 C.F.R. § 656.10(d)(1).

Although the petitioner claims that its former counsel was incompetent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). Any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to

⁵ United States Department of Labor, Atlanta National Processing Center

- the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
 - (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Although counsel claims that former counsel no longer resides in or practices in the United States and provides a letter written by counsel to former counsel informing former counsel of the petitioner's intent to make a *Lozada* claim 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). The petitioner does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

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.