

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

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: APR 18 2013

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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 Director, Nebraska Service Center (director), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a rehabilitation services company. 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 director denied the petition because the petitioner failed to submit a valid prevailing wage determination in accordance with 20 C.F.R. § 656.40.

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

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.*

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

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).

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 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).

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 November 2, 2009. The PWD in the record of proceeding was issued by the Illinois Department of Employment Security on July 30, 2008 and was valid through June 30, 2009. Accordingly, the PWD was not valid on the date of filing.

On appeal, counsel asserts that the regulation at 20 C.F.R. § 656.40 provides that employers have the option of either beginning recruitment or filing the petition during the validity of the prevailing wage determination for Schedule A occupations. Counsel contends that the petitioner began recruitment by posting the notice of filing on May 7, 2009, which was during the period of validity of the PWD.

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. *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").

Therefore, the posting requirement for Schedule A occupations is not a recruitment step, and the petitioner was required to submit a valid PWD with the petition which complies with the requirements of 20 C.F.R. § 656.40. *See also* 20 C.F.R. § 656.15(b)(1).

On appeal, counsel also asserts that the petitioner's failure to comply with the requirements of 20 C.F.R. § 656.40 is a harmless, paperwork error and should be excused. To support his assertion, counsel cites to various Board of Alien Labor Certification Appeals (BALCA) cases in which errors were made in conjunction with the advertisements during recruitment or in which typographical errors were made on the labor certification application. Counsel, however, does not cite to one case that is relevant to the current case. All of the cases cited by the petitioner relate to applications filed

under the basic process for labor certification pursuant to 20 C.F.R. § 656.17, and not under the process for Schedule A occupations pursuant to 20 C.F.R. § 656.15. Additionally, failure to comply with the regulations and filing requirements, as in the current case, is not a harmless, paperwork error. The validity period for the PWD expired on June 30, 2009. The petition was not filed until November 2, 2009. Counsel contends that the PWD “would not have been much different than the one the employer submitted with its application.” However, the authority to issue the PWD and its validity period, in this case, was the Illinois Department of Employment Security (IDES), and they determined that the PWD was valid through June 30, 2009. The petitioner was required to submit a valid PWD with the petition in compliance with the requirements of 20 C.F.R. § 656.40. *See also* 20 C.F.R. § 656.15(b)(1). It failed to do so.

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 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.