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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

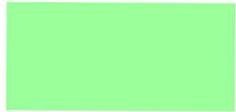


U.S. Citizenship
and Immigration
Services



DATE: OFFICE: NEBRASKA SERVICE CENTER FILE:

FEB 12 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the immigrant visa petition. The petitioner submitted an untimely appeal, which was treated as a motion to reopen or reconsider. The director affirmed the denial, prompting the petitioner to appeal. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a staffing business. 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 file the labor certification within the validity period of the prevailing wage determination (PWD) in accordance with 20 C.F.R. § 656.40. When adjudicating the motion to reopen or reconsider, the director also found that the petitioner failed to establish that the beneficiary possessed all the qualifications necessary to take the physical therapist licensing examination in the State of New York, and thus was not qualified for the proffered job as set forth on the labor certification.

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.*

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).

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

Prevailing Wage Determination

Schedule A petitions must be accompanied by a PWD provided by a state workforce agency. 20 C.F.R. § 656.40. The PWD must specify a validity date which must be no less than ninety (90) days or more than one year from the determination date. *Id.* The petition and ETA Form 9089 must be filed within the validity period. Finally, the proffered wage must meet 100% of prevailing wage rate. *Id.*

The petitioner failed to submit a PWD that meets the requirements of 20 C.F.R. § 656.40. The petitioner did not 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 September 24, 2007. The petition was accompanied by a PWD that expired on September 13, 2007. We note that this first PWD determination was filed on behalf of a different employee, at a different location, in a different city. The petitioner submitted a second PWD, which again was for a different beneficiary at a different location, and was issued after the instant priority date. Again, this PWD was not valid at the time the petition was filed. Finally, the petitioner, in filing its motion to reopen or reconsider, submitted a third PWD. The third PWD was valid at the time the petition was filed, however, was for a petition filed for a different beneficiary in a different county in New York. Thus, the petition and ETA Form 9089 were not submitted with a valid PWD as is required by the regulations.

On appeal, counsel states that the offered wage in this case is greater than the prevailing wage, which excuses its ability to comply with the regulations requiring a valid prevailing wage determination to be submitted with the petition and labor certification. Nothing in the regulations or the Act excuses the petitioner from strict compliance with the above requirements.

Posting Notice

Beyond the decision of the director,³ we find that the petitioner failed to establish that it complied with the regulatory posting notice requirements. Petitions for Schedule A occupations must also contain evidence establishing that the employer provided its U.S. workers with notice of the filing of

³ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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).

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.*

The petitioner in this case is not a care giver, but rather is a staffing agency that appears to match providers with potential employees. The petitioner's headquarters are located in Indianapolis, Indiana. The point of contact on both the petition and the ETA Form 9089, [REDACTED] is located in Indianapolis. [REDACTED] signed a document stating that the posting notice in the instant case was posted at [REDACTED], from April 7, 2007, to April 25, 2007. [REDACTED] does not explain how she has personal knowledge that this posting notice was in fact posted in a visible place at this location. This is a material omission that undercuts the credibility of her attestation. Furthermore, on that same document, [REDACTED] failed to explain why no in-house media was used to disseminate the posting notice. Finally, the notice did not provide the address where employees could contact the Certifying Official to provide comment on the application.

The AAO finds that certification from [REDACTED] that the notice was posted lacks enough information to be credible in the instant case.

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 petition must be denied and the appeal dismissed because the petitioner failed to submit a valid PWD in accordance with 20 C.F.R. § 656.40, failed to carry its burden of proof that the notice of filing was posted in accordance with the regulations, and failed to establish the beneficiary was eligible to practice physical therapy in the State of New York.

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.