U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF A-C-V-H-, INC.

DATE: APR. 27, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an elderly home care provider, seeks to employ the Beneficiary as a registered nurse. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Nebraska Service Center denied the petition. The Director determined that the petition was not accompanied by a prevailing wage determination (PWD) from the U.S. Department of Labor (DOL)'s National Processing Center (NPC), as required for Schedule A occupations like that in the instant petition. The Director found that the PWD in the record, which was submitted in response to the Director's request for evidence (RFE), is for another business entity (the Petitioner's parent) and was not valid at the time the petition and accompanying labor certification were filed.

On appeal, the Petitioner submits a new PWD for the Petitioner and asserts that the petition should now be approved.

Upon *de novo* review, we will dismiss the appeal.

## I. LAW

The petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which the 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 foreign nationals in such occupations. The current list of Schedule A occupations includes professional nurses. *Id.*

Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089, Application for Permanent Employment Certification, 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 an uncertified ETA Form 9089 in duplicate. *See* 8 C.F.R. § 204.5(a)(2), (l)(3)(i); *see also* 20 C.F.R. § 656.15.

Additionally, the petitioner must obtain a PWD (Form ETA 9141, Application for Prevailing Wage Determination) from the NPC 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(a), (c).

## II. ANALYSIS

### A. Prevailing Wage Determination

The petition and ETA Form 9089 were filed on February 2, 2016. In a subsequent RFE the Director requested the Petitioner to submit the PWD obtained from the NPC. The Petitioner responded to the RFE with a copy of a PWD obtained by the Petitioner's parent company, with a validity period of May 11, 2016, to August 9, 2016. Thus, the PWD was not obtained by the Petitioner and was not valid at the time the petition and labor certification were filed on February 2, 2016. The Director denied the petition on the ground that it was not accompanied by a proper labor certification application.

On appeal the Petitioner has submitted its own PWD from the NPC with a validity period of December 12, 2016, to June 30, 2017. While this PWD applies to the Petitioner, it was not valid at the time the petition was filed on February 2, 2016. As such, it does not meet the timing requirement of 20 C.F.R. § 656.40(c). 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 did not submit a valid PWD in accordance with 20 C.F.R. § 656.40. The Petitioner has not overcome the lack of a valid PWD on appeal. Accordingly, we will dismiss the appeal.

### B. Ability to Pay

Although not mentioned by the Director's decision, we note that the Petitioner has not established its ability to pay the proffered wage of the job offered, $28 per hour (or $58,240 per year based on a work year of 2080 hours). A petitioner must establish its continuing ability to pay the proffered wage from the priority date of the petition – in this case, February 2, 2016 – to the date the Beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The regulation specifies that a petitioner must submit either annual reports, or federal tax returns, or audited financial statements as evidence of its ability to pay. In this case the Petitioner submitted a copy of its federal income tax return for the one-year time period of October 1, 2013, to September 30, 2014. In the RFE the Director requested more recent evidence of the Petitioner's ability to pay the proffered wage – specifically, its annual report, or U.S. tax return, or audited financial statement for 2014 or 2015, or a statement from the Petitioner's financial officer if the company has 100 or more employees. The Petitioner did not submit any of this evidence. Instead, in response to the RFE the Petitioner submitted the 2014 annual report of its parent company, which is not the

Petitioner in this proceeding. Thus, the only evidence in the record of the Petitioner's ability to pay is for a 1-year time period that ended 16 months before the priority date of the petition. This evidence does not establish the Petitioner's continuing ability to pay the proffered wage from the priority date onward. For this reason as well, the petition cannot be approved.

## III. CONCLUSION

The Petitioner has not submitted a valid prevailing wage determination and has not established its continuing ability to pay the proffered wage from the priority date up to the present. For both of these reasons the appeal will be dismissed.

**ORDER:** The appeal is dismissed.

Cite as *Matter of A-C-V-H-, Inc.*, ID# 278017 (AAO Apr. 27, 2017)