U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32024132

Date: AUG. 29, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional or Alien of Exceptional Ability

The Petitioner, a movie and television sound production business, seeks classification for the Beneficiary as an individual of exceptional ability in the performing arts, as a music producer. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This second preference classification makes immigrant visas available to foreign nationals with a degree of expertise significantly above that normally encountered in the sciences, arts, or business.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish that it complied with regulations requiring posting notice of the job opportunity.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The AAO reviews the questions in this matter *de novo*. *See Matter of Christo's Inc*., 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

Second preference immigrant visas are available for qualified individuals who are advanced-degree professionals or who, because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2) of the Act. An advanced degree is one above a baccalaureate.[1] 8 C.F.R. § 204.5(k)(2). Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *Id*.

This petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5 for which the U.S. Department of Labor (DOL) has already 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 noncitizens in such occupations. Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified ETA Form 9089, Application for Permanent Employment

[1] The definition of advanced degree also includes a baccalaureate followed by at least five years of progressive experience. 8 C.F.R. § 204.5(k)(2).

Certification, from DOL prior to filing the petition with USCIS. Instead, the petition is filed directly to USCIS with an uncertified ETA 9089 in duplicate. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15. The petition must also include a prevailing wage determination (PWD) in accordance with 20 C.F.R. § 656.40. *See* 20 C.F.R. § 656.15(b)(1).[2]

Occupations for individuals with exceptional ability in performing arts are designated as Schedule A, Group II occupations. This designation requires that a petitioner submit evidence that the beneficiary satisfies criteria demonstrating exceptional ability (for example, documentation of widespread acclaim and international recognition, play bills and star billings, published material about the beneficiary) as outlined in 20 C.F.R. § 656.15(d)(2)((i)-(vi)).[3] Beyond demonstrating the beneficiary's exceptional ability, the documentation presented must establish that the beneficiary worked for the past year in a position that requires an individual of exceptional ability and that the beneficiary's services are sought for a position that requires an individual of exceptional ability. 20 C.F.R. § 656.15(d)(2). As with most filings for an employment-based immigrant that requires a job offer, this petition must include evidence that the prospective United States employer has the ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2).

As noted above, one of the requirements to meet Schedule A eligibility is that the petitioner is required to post the position in accordance with 20 C.F.R. § 656.10(d).

20 C.F.R. § 656.10(d) states:

> (1) In applications filed under § 656.15 (Schedule A) … the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the certifying officer as follows:
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> (i) To the bargaining representative(s) (if any) of the employer's employees …
>
> (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment … In addition, the employer must publish the notice 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. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.
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> . . .

[2] A request for prevailing wage determination is submitted to DOL on Form ETA 9141, Application for Prevailing Wage Determination, which requires that an employer provide the details of the job offer, including the job title, job duties, work location (including whether work will be performed in multiple locations), and the minimum job requirements. After processing, DOL returns the ETA 9141 with a determination of the prevailing wage rate and level for the position described therein.

[3] In *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010), we held that, "truth is to be determined not by the quantity of evidence alone but by its quality."

(3) The notice of the filing of an Application for Permanent Employment Certification must:

(i) State 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.
. . .

(6) If an application is filed under the Schedule A procedures . . . the notice must contain a description of the job and rate of pay, and must meet the requirements of this section.

With the initial filing, the Petitioner provided evidence that it posted notice of the filing at the location of employment, which is listed as its address in California. Both the ETA 9089 and the PWD also list the work location as the Petitioner's address in California.[4] The notice was posted from June 9 to June 23, 2023.

In a request for evidence (RFE), the Director notified the Petitioner that the record did not include evidence that the notice of filing was clearly visible and unobstructed while posted in a conspicuous place where employees could read it. The Director also stated that the record did not include evidence that the notice was posted to the Petitioner's in-house media, either electronic or in print.

In response to the RFE, the Petitioner submitted a letter from its owner stating that the notice was posted "at the [Petitioner's] place of business at a posting location that was clearly visible for employees during the normal course of business while our employees were working on assignments and doing their work for [Petitioner]." The Petitioner's owner further stated that the Petitioner does not use in-house media to advise employees of available positions. He stated, "We are a company of only currently (6) employees and therefore do not post any information about any possible positions in any in-house media, either electronic or in-print ... we do not even have any 'in-house' media either electronic or print."

The Director denied the petition, concluding that the Petitioner did not establish that the notice was clearly visible and unobstructed while posted. The Director noted that the Petitioner's owner's statement that the company does not post available positions in any in-house media, either electronic or print, "seems to indicate that the posting was not even posted in print form."

On appeal, the Petitioner submits an additional statement from its owner describing the location of the posted notice as a "kitchen area inside the office right next to the sound production and recording studio." The Petitioner submits photos of the notice posted above the sink in the kitchen area, additional photos of the office space, and evidence that the notice was posted on Slack (an application

[4] In answer to question 7 on the ETA 9141, "Will work be performed in multiple worksites within an area of intended employment or a location(s) other than the address listed above?" the Petitioner answered "No."

used for communicating within the office) on June 9, 2023, with the comment, "We have a job listing posted on the office wall – it'll be here for 10 days." Additionally, the Petitioner submits statements from three employees attesting that they saw the posted notice in the kitchen and on the Slack page.

Upon de novo review of the record, including evidence submitted on appeal, we conclude that the Petitioner has established that the notice of filing met the requirements of 20 C.F.R. § 656.10(d)(1)(ii). Accordingly, we will withdraw the Director's decision.

The Petitioner provided evidence related to the Beneficiary's claim that she satisfies criteria demonstrating exceptional ability as outlined in 20 C.F.R. § 656.15(d)(2)((i)-(vi)), but the Director did not review or analyze this evidence to make that determination and we decline to make that determination in the first instance. We will therefore remand the matter. On remand, the Director should evaluate the evidence and consider the petition in its entirety to determine whether the record establishes that the Beneficiary is eligible as an individual of exceptional ability in the performing arts. Beyond demonstrating the Beneficiary's exceptional ability, the documentation presented must establish that the Beneficiary worked for the past year in a position that requires an individual of exceptional ability and that the Beneficiary's services are sought for a position that requires an individual of exceptional ability. The Petitioner must also establish its continuing ability to pay the proffered wage from the date of filing.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.