U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28981537

Date: FEB. 07, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, a healthcare staffing agency, 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 (the 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 noncitizen 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, concluding that the record did not establish that the Petitioner had submitted a properly completed uncertified Form ETA 9089, Application for Permanent Employment Certification (labor certification application). The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

The DOL has determined that there are not sufficient U.S. workers who are able, willing, qualified, and available for certain occupations designated under Schedule A, which in relevant part includes workers who will be employed as professional nurses who hold a permanent, full, and unrestricted license to practice professional nursing in the state of intended employment. *See* 20 C.F.R. § 656.5(a)(2)(ii). An employer seeking labor certification for a Schedule A occupation must apply under 20 C.F.R. §§ 656.10 and 656.15. 20 C.F.R. § 656.10(a)(3). Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified labor 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 labor certification application. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.

An employer must document that it notified its employees of its Schedule A application. 20 C.F.R. § 656.10(d)(1). If employees in the offered position have no bargaining representative, an employer must post notice for at least 10 consecutive business days to its employees "at the facility or location of the employment." 20 C.F.R. § 656.10(d)(1)(ii). A filing notice must: state the application's filing; indicate that anyone may submit documentary evidence regarding the application to the DOL Certifying Officer; and provide the Certifying Officer's address. 20 C.F.R. §§ 656.10(d)(1)(ii),(3). A filing notice must also contain a description of the job and its rate of pay.

Also, a Schedule A employer must attest that "[t]he offered wage equals or exceeds the prevailing wage determined pursuant to [20 C.F.R.] § 656.40 and § 656.41." 20 C.F.R. § 656.10(c)(1). A prevailing wage determination from the DOL must be included with a Schedule A petition. 20 C.F.R. § 656.15(b)(1). The proffered wage stated on a Schedule A filing notice therefore must equal or exceed the prevailing wage.

An application for Schedule A designation of a skilled worker position must demonstrate that the job requires at least two years of training or experience. 8 C.F.R. § 204.5(l)(2), (4). "Relevant post-secondary education may be considered as training for the purposes of this provision." 8 C.F.R. § 204.5(l)(2) (defining the term "skilled worker").

II. ANALYSIS

As noted above, the Petitioner requests classification of the Beneficiary as a skilled worker under Schedule A, and stated in Parts H.4 and H.4-B of its Form ETA 9089 that the position of registered nurse requires an associate's degree in nursing. These job requirements comport with the requirements of the requested classification, wherein a position must require at least two years of training or experience, or two years of relevant post-secondary education. However, although the Petitioner answered "No" in in Part H.8 to indicate that an alternate combination of education and experience was not acceptable, it checked the box for a master's degree in H.8-A as an alternate education requirement.

In response to the Director's request for evidence (RFE), which noted that the required filing notice and evidence regarding in-house media had not been submitted, the Petitioner submitted a filing notice which stated the minimum educational requirement for the registered nurse position as an associate's degree in nursing. However, the Petitioner indicated on Form ETA-9141, Application for Prevailing Wage Determination (PWD), that the position requires a bachelor's degree in nursing as a minimum educational requirement. The Director noted this discrepancy in his notice of intent to deny (NOID), along with missing and incorrect information on the ETA-9089, including Part H.8-A. After review of the Petitioner's response to the NOID, the Director concluded that the Petitioner had not met its burden to resolve the discrepancy regarding the minimum education requirement. He accordingly denied the petition because it was not accompanied by a proper labor certification application.

On appeal, the Petitioner does not dispute the discrepancy between the minimum educational requirements for the position listed on its PWD versus those listed on the ETA Form 9089 and notice of filing. But it asserts that there is no requirement under the regulations at 20 C.F.R. § 656.10(d) that the filing notice list the minimum educational requirements for the position, and that the Director's citation to a footnote from the *USCIS Policy Manual*'s chapter regarding petitions for Schedule A

occupations imposes additional requirements beyond the regulations. We agree that the regulations do not include such a requirement. As far as the footnote, which states that the requirements on Form ETA 9089 "should line up with" those on listed on the PWD and filing notice, it serves as a reminder to adjudicators to be alert for discrepancies between these documents. 6 *USCIS Policy Manual* E.7, n. 40, www.uscis.dhs.gov/policy-manual. In any event, this argument does not address the discrepancy between the minimum educational requirement listed on the Form ETA 9089 and the PWD, both of which do require that information to be listed.[1]

The Petitioner's representative also asserts that the prevailing wage for a registered nurse position that requires a bachelor's degree is higher than that for a position requiring an associate's degree, and therefore accomplishes the purpose of the PWD and establishes that the proffered wage equals or exceeds the prevailing wage. But the record does not include a PWD for this position and location with an associate's degree in nursing as the minimum requirement, and the unsubstantiated assertions of counsel do not constitute evidence. *See, e.g., Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) ("statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight").

It is the Petitioner's burden to resolve discrepancies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, the Petitioner has not offered an explanation for the different minimum and alternate educational requirements in the record or provided evidence to resolve these inconsistencies.

In addition, these are not the only material discrepancies in the petition. The Petitioner stated in Part 6 of Form I-140, Immigrant Petition for Alien Worker, that the Beneficiary would work at an address in New York, while it indicated in Part H of the ETA Form 9089 and in the PWD that the work would be performed in South Carolina. While the Petitioner attempted to address this discrepancy by submitting a new I-140 form with the South Carolina worksite address, a petitioner may not make material changes to a petition that has already been filed to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). The location of the prospective worksite is material to both the notice of filing requirement and the prevailing wage requirement under DOL's Schedule A regulations.

Because of the unresolved discrepancies concerning both the worksite location and the minimum requirements for the position of registered nurse, the Petitioner has not established that the PWD it submitted accurately reflects the wages offered for comparable positions at the worksite, and it therefore cannot show that the offered wage equals or exceeds the prevailing wage. Accordingly, the petition must remain denied.

[1] The Petitioner's representative devotes several pages of his brief to arguments about whether the *USCIS Policy Manual* superseded a previous USCIS memorandum that he cited in his response to the Director's NOID. Counsel cited that memorandum for the premise that the sole purpose of the PWD "is to ensure that that the prevailing wage determination is reflective of the wages being offered for comparable positions in the location where the job offer exists at the time that the I-140 petitioner recruits the alien worker." As the *USCIS Policy Manual* includes nearly identical language, we will not address these arguments since they are moot. *See* 6 *USCIS Policy Manual* F.7(D)(1), www.uscis.gov/policy-manual.

ORDER: The appeal is dismissed.