U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15368790

Date: FEB. 16, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a healthcare provider, seeks to employ the Beneficiary as a registered nurse. It requests classification of the Beneficiary under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

The Director of the Nebraska Service Center denied the petition, concluding that the petition was not accompanied by a proper application for labor certification as it did not include the required notice of filing posted between 30 and 180 days before filing the application. Specifically, the Director concluded that the notice of filing did not meet the requirements of 20 C.F.R. § 656.10(d)(3)(iv) because it was posted more than 180 days before filing the application. The Director granted a subsequent motion to reconsider and affirmed the denial on the same basis.

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 Administrative Appeals Office (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 sustain the appeal.

This 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 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. *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 9089 in duplicate. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.

The petition was submitted on March 31, 2020, with an ETA 9089 describing the Petitioner's job opportunity of registered nurse. With the petition, the Petitioner provided evidence that it posted a notice of filing in accordance with 20 C.F.R. § 656.10(d), as required for Schedule A eligibility.[1] The Petitioner attested that the notice of filing was posted indefinitely as a continuous posting from June 6, 2019 onward, and thus met the requirement of posting for the required 10 days within 180 days of filing.[2]

On appeal, upon review of the entire record, we conclude that the Petitioner has established that the notice of filing was properly posted within the required timeframe and met the requirements of 20 C.F.R. § 656.10(d)(3)(iv) and that it is eligible for the requested benefit in all other respects.

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[1] 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:
>
> (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 …
> . . .
>
> (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.

[2] The DOL has advised that an indefinite posting of the notice of filing may meet the requirements of the regulation.

> May I post a Notice of Filing for a permanent labor certification indefinitely?
>
> Yes, an employer can satisfy Notice of Filing requirements with respect to several positions in each of these job classifications with a single Notice of Filing posting, as long as the single posting complies with the Department of Labor's regulation for each application (e.g. contains the appropriate prevailing wage information and the Notice of Filing must be posted for 10 consecutive business days during the 30 to 180 day time window prior to filing the application). For instance, separate notices would have to be posted for an attending nurse and a supervisory nurse (e.g. nurses containing different job duties). NOTE: At the time of filing the labor certification, the prevailing wage information must not have changed, the job opportunity must remain the same and all other Department of Labor regulatory requirements must be followed.

See U.S. Department of Labor, Employment & Training Administration, "Office of Foreign Labor Certification Frequently Asked Questions and Answers," https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!174 (last visited February 3, 2021).

Accordingly, the appeal is sustained, and the petition is approved under section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).

ORDER: The appeal is sustained.