U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-H-L-A-

DATE: JAN. 18, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a children's hospital, seeks to employ the Beneficiary as a registered nurse. It requests classification of the Beneficiary as a professional under the third preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based "EB-3" immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition on the ground that it was not accompanied by a proper application for labor certification. Specifically, the Director found that the prevailing wage determination (PWD) submitted as part of the Petitioner's labor certification application was no longer valid at the time the petition was filed.

On appeal, the Petitioner asserts that the PWD was valid at the time it was filed with the labor certification application and the petition, that the petition was therefore properly filed, and that it should be approved.

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

I. LAW

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 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 employer to test the labor market and obtain a certified ETA Form 9089 (labor certification) from the DOL prior to filing its petition with USCIS. Instead, the petition is filed directly with USCIS with an uncertified ETA Form 9089 (labor certification application) in duplicate. *See* 8 C.F.R. §§ 204.5(a)(2) and (k)(4); *see also* 20 C.F.R. § 656.15.

As part of its labor certification application for a Schedule A occupation the employer must also obtain a PWD (Form ETA 9141) from the DOL's National Processing Center (NPC). *See* 20 C.F.R. § 656.15(b)(1). The labor certification application must be filed with USCIS, along with the petition

for the Schedule A occupation, within the validity period specified on the PWD. *See* 20 C.F.R. § 656.40(c

II. ANALYSIS

The issue in this case is whether the Form I-140, Immigrant Petition for Alien Worker (I-140 petition), was filed with a valid PWD. The regulation at 20 C.F.R. § 656.40(c) states as follows with regard to the validity period of a PWD:

> The National Processing Center must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a prevailing wage rate provided by the NPC, employers must file their applications or begin the recruitment period required by §§ 656.17(e) or 656.21 of this part within the validity period specified by the NPC.

In this case, the Petitioner filed its I-140 petition on October 20, 2017. The petition was accompanied by a labor certification application and a PWD that was valid from May 12, 2017, to August 10, 2017. The Director found that the PWD was no longer valid when the labor certification application and the I-140 petition were filed with USCIS. Accordingly, the Director denied the petition for lack of the required PWD.

On appeal the Petitioner asserts that its PWD was valid at the time the I-140 petition and the labor certification application were filed because it posted the notice of filing required by 20 C.F.R. § 656.10(d) during the validity period of the PWD. Essentially, the Petitioner argues that by posting the required notice of filing it began recruitment during the validity period of the PWD and therefore meets the requirements of 20 C.F.R. § 656.40.

However, the notice of filing, governed by 20 C.F.R. § 656.10(d), is not recruitment as described in 20 C.F.R. § 656.17(e) or 20 C.F.R. § 656.21. Neither of these regulations – 20 C.F.R. § 656.17(e) (Required pre-filing recruitment in the Basic labor certification process) or 20 C.F.R. § 656.21 (Supervised recruitment) – applies to labor certification applications for Schedule A occupations. According to 20 C.F.R. § 656.40(c), therefore, the employer of a Schedule A nurse must file its labor certification application within the validity period of the PWD issued by the NPC. The labor certification application for a Schedule A nurse is filed together with the I-140 petition, which means the I-140 petition must also be filed within the validity period of the PWD.

In this case, the validity period of the PWD was May 12, 2017, to August 10, 2017. The I-140 petition and the labor certification application, which included the PWD, were filed with USCIS on October 20, 2017. That date was more than two months after the expiration of the PWD's validity period. Thus, the I-140 petition and the accompanying labor certification application were not filed during the validity period of the PWD, as required by 20 C.F.R. § 656.40(c).

III. CONCLUSION

The appeal will be dismissed because the petition was not accompanied by a valid prevailing wage determination.

ORDER: The appeal is dismissed.

Cite as *Matter of C-H-L-A-*, ID# 2651194 (AAO Jan. 18, 2019)