U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 07375646

DATE: JAN. 24, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for a Professional

The Petitioner, a healthcare business, seeks to employ the Beneficiary as a physical therapist. It requests professional classification for the Beneficiary under the third preference immigrant category. 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 the Petitioner did not properly post the notice of its application for permanent employment certification because the posting did not contain a complete description of the job duties and education/experience requirements for the proffered position and therefore did not comply with the regulation at 20 C.F.R. § 656.10(d)(1).

On appeal the Petitioner asserts that it did comply with the regulatory requirements for the posted notice, which do not include a description of the job duties and education/experience requirements.

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 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 physical therapists. *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 regulation at 20 C.F.R. § 656.10(d) sets forth the notice and documentation requirements for applications for permanent employment certification involving Schedule A occupations filed under 20 C.F.R. § 656.15. The regulation provides that if the employer's employees have a bargaining representative the notice of the filing of the application for permanent employment certification must

be posted in the area of intended employment and may be documented by copies of the notice and the ETA Form 9089. 20 C.F.R. § 656.10(d)(1)(i). The regulation also provides that if there is no bargaining representative the notice of the filing of the application for permanent employment certification must be posted for at least 10 consecutive business days in a conspicuous location at the facility or location of the employment, among other requirements, and may be documented by copies of the notice and all in-house media that was used to distribute the notice. 20 C.F.R. § 656.10(d)(1)(ii). Additional substantive requirements for the notice of the filing an ETA Form 9089 are contained in 20 C.F.R. § 656.10(d)(3). Finally, the regulation at 20 C.F.R. § 656.10(d)(6) states that a notice posted for an ETA 9089 filed under the Schedule A procedures at 20 C.F.R. § 656.15 "must contain a description of the job and rate of pay, and must meet the requirements of this section."

II. ANALYSIS

Counsel asserts that a "description of the job" and the "rate of pay" is all that the regulations require in the posted notice. Counsel further notes that the job duties described in the notice are the same as those contained on the ETA Form 9089.

While there is no strict requirement in 20 C.F.R. § 656.10(d)(1) that the Petitioner's notice of its application for permanent employment certification include a complete description of the job duties and education/experience requirements for the proffered position, the posted notice must be consistent with the specifications and requirements set forth in the ETA Form 9089. The job requirements as stated in the ETA Form 9089 include a bachelor's degree (U.S. or foreign equivalent) in physical therapy and a New York state physical therapist license. The associated Form ETA-9141 (Application for Prevailing Wage Determination) states that performance of the job duties will require "local travel to client locations." The Petitioner is located in [redacted] and its website notes that the company "has a vast network of client sites across the Tri-state area (New York, New Jersey, and Connecticut)." The Petitioner's posted notice announced "multiple openings" for a physical therapist, but did not specify any educational requirement or whether, and for what state(s), a license was required.

Educational requirements in the field of physical therapy have changed over the years, and vary by state. When posting for multiple physical therapists, it might not be clear whether a bachelor's degree would be acceptable, or if a master's degree is required for a particular position. Additionally, different educational requirements might result in different prevailing wage determinations and necessitate the listing of different rates of pay on the posted notice to account for multiple openings. Without a reference to either the educational or the state licensure requirements specified in the ETA Form 9089, the Petitioner's notice of filing was insufficient to apprise U.S. workers of the job opportunity. *See Matter or Architectural Stone Accents*, BALCA Case No. 2011-PER-02719, ETA Case No. A-09042-27228 (July 3, 2013), where the Board of Alien Labor Certification Appeals (BALCA) looked to whether the overall text of the Notice of Filing was sufficient to apprise U.S. workers of the job opportunity.[1]

[1] While BALCA decisions are not binding on the AAO, they are instructive on certain issues and may provide guidance in our adjudication of particular cases. The Notice of Filing (NOF) regulation is an implementation of a statutory requirement imposed by the Immigration Act of 1990, Public Law 101-649, 104 Stat. 4978 (Nov. 29, 1990, eff. Oct. 1, 1991). In *Hawai'i Pacific University*, 2009-PER-127 (March 2, 2010) (en banc), BALCA found that the NOF serves a dual purpose

In accord with the foregoing analysis, we will dismiss the appeal.

ORDER: The appeal is dismissed.

of recruiting U.S. workers and, primarily, of providing a method for employees and interested persons to present information to the certifying officer about an employer's application.