U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-C-V-H-, INC.

DATE: JAN. 27, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an elderly home care business, 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 and filed for the Beneficiary as a Schedule A nurse. *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 foreign national for lawful permanent resident status to work in a position that requires at least 2 years of training or experience.

The Director, Nebraska Service Center, concluded that the Form I-140 petition and application for labor certification were incomplete because the filing was not accompanied by a valid prevailing wage determination. Specifically, the Director noted that the Petitioner submitted a prevailing wage determination that was issued to a different company than the petitioning company, and that the determination was not valid when the current petition was submitted. Accordingly, the Director denied the petition.

The matter is now before us on appeal. The Petitioner submits a new prevailing wage determination, and asserts that since this new determination should be accepted and the petition should be approved. Upon *de novo* review, we will dismiss the appeal.

I. LAW

The petition is for a Schedule A occupation. A Schedule A occupation is an occupation codified at 20 C.F.R. § 656.5(a) for which the U.S. 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 and 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 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 a duplicate uncertified ETA Form 9089. *See* 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i); *see also* 20 C.F.R. § 656.15.
If the Schedule A occupation is a professional nurse, the petitioner must establish that the

beneficiary has a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). *See* 20 C.F.R. § 656.5(a)(2).

Petitions for Schedule A occupations must also contain evidence establishing that the employer provided its U.S. workers with notice of the filing of an ETA Form 9089 (Notice) as prescribed by 20 C.F.R. § 656.10(d), and a valid prevailing wage determination (PWD) obtained in accordance with 20 C.F.R. § 656.40 and 20 C.F.R. § 656.41. *See* 20 C.F.R. § 656.15(b)(2).

For the Notice requirement, the employer must provide notice of the filing of an ETA Form 9089 to any bargaining representative for the occupation, or, if there is no bargaining representative, by posted notice to its employees at the location of the intended employment. *See* 20 C.F.R. § 656.10(d)(1).

The regulation at 20 C.F.R. § 656.10(d)(3) states that the Notice shall:

(i) State that 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.

Notices for Schedule A occupations must also contain a description of the job offered and the rate of pay. *See* 20 C.F.R. § 656.10(d)(6).

In cases where there is no bargaining representative, the Notice must be posted for at least 10 consecutive business days, and it must be clearly visible and unobstructed while posted. 20 C.F.R. § 656.10(d)(1)(ii). The Notice must be posted in a conspicuous place where the employer's U.S. workers can readily read it on their way to or from their place of employment. *Id.* In addition, the Notice must be published "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." *Id.* The satisfaction of the Notice requirement may be documented by "providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media" used to distribute the Notice. *Id.*

II. ANALYSIS

The priority date of a Schedule A petition is the date the petition is properly filed with USCIS. 8 C.F.R. § 204.5(d). In this case, the priority date is January 14, 2016. On the ETA Form 9089, Application for Permanent Employment Certification, the Petitioner indicated that the prevailing wage was $27.65 per hour, but did not provide a prevailing wage tracking number as requested at

Line F.1. The Petitioner did not reflect the proffered wage on the ETA Form 9089, Line G.1., but listed the proffered wage on the Form I-140 petition as $32.75 per hour.

A. Prevailing Wage Determination

As noted above, in order for the petition to be approved, the petitioner must submit a PWD that complies with the requirements of 20 C.F.R. § 656.40. *See also* 20 C.F.R. § 656.15(b)(1). The regulation at 20 C.F.R. § 656.40(c) states that a Schedule A application must be filed within the validity period of the PWD.

In the instant case, the initial petition was supported by only a printout from the Online Wage Library. The Director therefore found that the current petition was not accompanied by a valid PWD, as required by regulation, and issued a request for evidence (RFE), instructing the Petitioner to submit a PWD that was valid on the January 16, 2016, priority date. The Petitioner responded to the RFE by submitting a copy of a PWD that was issued to a company other than the Petitioner, that was issued for a job with different job duties than the job offered to the current Beneficiary, and that was valid from May 11, 2016, until August 9, 2016. On August 23, 2016, the Director concluded that, as the PWD had validity dates after the priority date here and was for a separate company, the petition was not accompanied by a valid PWD as required by regulation and denied the petition.

On appeal, the Petitioner points to the printout from the Online Wage Library and states that this information regarding prevailing wage rates was submitted "in accordance to established regulations." However, while this printout is a collection of data on wage rates that DOL would utilize to determine the wage, it is not a Prevailing Wage Determination issued by DOL, which is expressly required by 20 C.F.R. § 656.40 and 20 C.F.R. § 656.15(b)(1).

Also on appeal, the Petitioner submits a new PWD that was issued to the petitioning company, and that is valid from December 12, 2016, until June 30, 2017. However, as this PWD was not valid on the January 16, 2016, priority date, it cannot satisfy the regulatory requirement.

The Petitioner urges us to "consider the impossibility of obtaining a Prevailing Wage Determination for something filed in the past." However, the regulations are clear that the Petitioner must obtain a PWD before filing the petition. A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). For the reasons set forth above, the Petitioner did not submit a valid PWD in support of the current petition.

B. Posting Notice Requirement

Beyond the decision of the Director, the Petitioner has also not established that it provided its U.S. workers with proper notice of the filing of an ETA Form 9089 (Notice) in the time period before filing as prescribed by 20 C.F.R. § 656.10(d).

In the instant case, there is no evidence in the record of a bargaining representative for the occupation. The Petitioner submitted a copy of a Notice of Job Opening dated June 29, 2016. The Petitioner affirmed that the notice was visible and unobstructed while posted, and that it was posted in a conspicuous place for at least 10 consecutive business days beginning on December 10, 2015. As the Form I-140 petition and the application for Schedule A designation were filed on January 14, 2016, a Notice posted December 10, 2015, and posted for 10 consecutive business days could not satisfy the regulatory requirement that the posting be completed between 30 and 180 days of the filing.[1] Therefore, the Notice does not satisfy the Notice requirements as prescribed by 20 C.F.R. § 656.10(d). Accordingly, the petition must also be denied for this reason.

III. CONCLUSION

In summary, the Petitioner did not submit a valid prevailing wage determination in accordance with 20 C.F.R. § 656.40 and did not satisfy the requirements for providing a proper notice of the filing of an ETA Form 9089 in accordance with 20 C.F.R. § 656.10(d).

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of A-C-V-H-, Inc.*, ID# 268680 (AAO Jan. 27, 2017)

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[1] *See* DOL Frequently asked questions. https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!169 (accessed January 26, 2017).

> **Must the ten consecutive business days posting of the notice of filing timeframe end at least 30 days prior to filing?**
>
> Yes, the last day of the posting must fall at least 30 days prior to filing in order to provide sufficient time for interested persons to submit, if they so choose, documentary evidence bearing on the application.