MATTER OF W-G-P-, INC.

DATE: JUNE 20, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a health care service company, 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 foreign national 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 revoked the approval of the petition, concluding that the record did not establish, as required, that there was a valid job offer available with the Petitioner. The Director also noted that the National Visa Center (NVC) has received a number of letters from previous beneficiaries complaining about the Petitioner.

On appeal, the Petitioner submits additional evidence and asserts that the job offer to the Beneficiary was valid when the petition was filed and when the Beneficiary attended her overseas immigrant visa interview. The Petitioner states that it doesn't currently have a job placement for the Beneficiary, but that it is confident that it can place her as a registered nurse within one to two months of entry in the United States. The Petitioner also disputes the allegations filed by some of its previous beneficiaries with the NVC.

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

I. LAW AND ANALYSIS

A. Petitions for Schedule A Occupations

This 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 a petitioner to test the labor market and obtain a certified ETA Form 9089, Application for Permanent Employment Certification, (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 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. The priority date of the petition is April 7, 2006. *See* 8 C.F.R. § 204.5(d).

If the Schedule A occupation is a professional nurse, a petitioner must establish that the beneficiary has a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS);[1] 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 petitioner 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).[2] To meet Schedule A eligibility, the petitioner must also submit with the petition a prevailing wage determination (PWD) in accordance with 20 C.F.R. §§ 656.40 and 656.41. *See* 20 C.F.R. § 656.15(b)(1).[3]

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[1] The Beneficiary's CGFNS Certificate was issued on [redacted] 2005.

[2] The petitioner must provide Notice 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). The Notice in this case was posted at [redacted] in [redacted] NY.

[3] The PWD was obtained for a job placement with [redacted]. At the time of the Beneficiary's immigrant visa interview at the U.S. Embassy in [redacted] Philippines, the Petitioner attempted to change the job placement to [redacted] located in [redacted] NY. The Petitioner acknowledges on appeal that there is no longer a valid job offer available for the Beneficiary at [redacted] or [redacted]. While the job placement with [redacted] appears to have been valid when the petition was filed, it was not valid when the Beneficiary attended her immigrant visa interview. Further, the Petitioner has not established that [redacted] is located in the same metropolitan statistical area as [redacted] and, therefore, it has not established that the PWD was valid for a job with [redacted] at the time of the immigrant visa interview. In addition, the record does not contain evidence that the Notice was posted at [redacted] pursuant to 20 C.F.R. § 656.10(d).

B. Revocation of the Petition's Approval

The Director initially approved the petition based on the Petitioner's commitment to place the Beneficiary as a registered nurse at [redacted]. The Director subsequently revoked the petition's approval, concluding that the record did not establish that there was a valid permanent job offer available with the Petitioner.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Good and sufficient cause exists to issue a notice of intent to revoke (NOIR) where the record at the time of the notice's issuance, if unexplained or unrebutted, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). In this case, good and sufficient cause supported the Director's issuance of the NOIR. As the NOIR indicated, the U.S. Embassy in [redacted] Philippines contacted [redacted] to confirm the offer of employment. An employee of [redacted] stated that [redacted] did not utilize full-time staff and that it only utilized temporary, part-time workers. Thus, the Director indicated in the NOIR that [redacted] statement contradicted the offer of full-time employment stated in the letter it provided for the Beneficiary's immigrant visa interview. The NOIR also noted that the NVC had received a number of letters from previous beneficiaries complaining about the Petitioner, including claims that the Petitioner does not place beneficiaries in areas of intended employment; that it pays less than the proffered wage; that it places beneficiaries in locations that are not identified in its visa petitions; that it charges beneficiaries "exorbitant" fees for filing immigrant visa petitions; and that it places multiple beneficiaries in housing meant for single occupancy. The Petitioner did not respond to the NOIR and the Director revoked the approval of the petition.

The Petitioner acknowledges on appeal that there is no longer a valid job offer available for the Beneficiary. We therefore affirm the Director's revocation of the approval of the petition. The petition's approval will remain revoked.[4]

C. Actual Job Requirements

Pursuant to 20 C.F.R. § 656.17(i)(1), the job requirements described on the labor certification must represent the Petitioner's actual minimum requirements for the job opportunity. The PWD submitted in this case indicated that the job requirements included a college degree in nursing, a New York State nursing license, no experience, and no training. The labor certification does not specify that a college degree in nursing is required, or that a New York State nursing license is required, as stated on the PWD. Instead, the labor certification requires a "nursing certificate" with no minimum level of education and no experience or training required for the offered position.

[4] Because the lack of a job offer is dispositive in this case, it is not necessary to address the previous beneficiaries' allegations against the Petitioner in this decision.

The posting notice for the offered position listed the only requirements for the job as: "CGFNS Certificate or Valid New York State Registered Professional Nurse License or Passage of NCLEX." These job requirements do not match those listed on the PWD or the labor certification. Thus, the actual minimum requirements for the position are not clear. The Petitioner has not established that the job requirements described on the labor certification must represent the Petitioner's actual minimum requirements for the job opportunity.

D. Ability to Pay the Proffered Wage

Although not addressed by the Director, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date. The regulation at 8 C.F.R. § 204.5(g)(2) requires the Petitioner to establish its ability to pay the proffered wage at the time the priority date is established and continuing until the Beneficiary obtains lawful permanent residence. The Petitioner must submit copies of its annual reports, federal tax returns, or audited financial statements or, if it employs 100 or more workers, we may accept a statement from a financial officer which establishes the Petitioner's ability to pay the proffered wage. *Id.*

The proffered wage is $53,290.00 per year, and the priority date is April 7, 2006. The record contains the Petitioner's 2004 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, together with reviewed financial statements for the years ending 2003 and 2004.[5] The record does not contain the Petitioner's annual reports, federal tax returns, or audited financial statements for 2006 onward as required by 8 C.F.R. § 204.5(g)(2). If the Petitioner pursues this matter further, it must submit regulatory-prescribed evidence of its ability to pay the proffered wage from 2006 onward.

II. CONCLUSION

The Petitioner has not established the existence of a valid, *bona fide* job offer for the Beneficiary. Further, the Petitioner has not established that the job requirements described on the labor certification represent the Petitioner's actual minimum requirements for the job opportunity, that it satisfied the Notice and prevailing wage determination requirements for the petition, or that it had the continuing ability to pay the proffered wage from the priority date. The petition's approval remains revoked.

[5] The regulation at 8 C.F.R. § 204.5(g)(2) states that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied the Petitioner's financial statements states that they are reviewed statements, as opposed to audited statements. Accountants express only limited assurances in reviews. As the accountant's report indicates, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Further, the reviewed financial statements do not cover the period from the priority date onward.

ORDER: The appeal is dismissed.

Cite as *Matter of W-G-P-, Inc.*, ID# 307198 (AAO June 20, 2017)