U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF C-

DATE: OCT. 9, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a healthcare system, 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. 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 denied the petition, concluding that the prevailing wage determination (PWD) does not support the labor certification in this case.[1] Specifically, the Director determined that the labor certification indicates that the minimum educational requirement for the offered job is a bachelor's degree, while the PWD "is for a worker with an Associate's Degree and not a Bachelor's degree." The labor certification does not allow for any alternate education.

On appeal, the Petitioner's counsel asserts that he made a typographical error on the labor certification and that it should have indicated that the minimum education required for the offered job is an associate's degree. He submits additional evidence in support of the appeal and asks that the petition be approved.

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

## I. EMPLOYMENT-BASED PETITIONS FOR SCHEDULE A OCCUPATIONS

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 foreign nationals in such

[1] To meet Schedule A eligibility, a petitioner must submit a valid PWD obtained in accordance with 20 C.F.R. §§ 656.40 and 656.41. *See* 20 C.F.R. § 656.15(b)(1).

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 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 labor certification. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.[2] If USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

## II. ANALYSIS

The regulation at 20 C.F.R. § 656.11(b) prohibits any modification to labor certifications filed after July 16, 2007.[3] There is no exception for Schedule A labor certifications. The regulation at 20 C.F.R. § 656.11 applies to all labor certification applications filed under part 656.[4] Thus, we cannot accept the Petitioner's request to make changes to the offered position on the labor certification.

We note that the preamble to the proposed rule, Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, 71 Fed. Reg. 7655 (Feb. 13, 2006), states that "[u]nder proposed 656.11(b), DOL clarifies that requests for modification to an application submitted under the current regulation will not be accepted... [n]othing in the streamlined regulation contemplates allowing or permits employers to make changes to applications after filing." *Id.* at 7659. The preamble highlights that "[i]n signing the application, the employer declares under penalty of perjury that he or she has read and reviewed the application and the submitted information is true and accurate to the best of his or her knowledge." *Id.* In this case, the Petitioner certified on the labor certification that the minimum educational requirement for the offered job is a bachelor's degree in nursing. Because

---

[2] The priority date of the petition is October 25, 2017, the date the completed, signed petition was properly filed with USCIS. *See* 8 C.F.R. § 204.5(d).

[3] The regulation at 20 C.F.R. § 656.11 states:

> § 656.11 Substitutions and modifications to applications.
> (a) Substitution or change to the identity of an alien beneficiary on any application for permanent labor certification, whether filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, and on any resulting certification, is prohibited for any request to substitute submitted after July 16, 2007.
> (b) Requests for modifications to an application will not be accepted for applications submitted after July 16, 2007.

[4] *See, e.g.*, DOL, Office of Foreign Labor Certification, "PERM Fraud Rule Round 2 FAQs," https://www.foreignlaborcert.doleta.gov/pdf/Fraud_Rule_Round2.pdf (last visited Feb. 4, 2019), which state that "[w]hile [DOL] has delegated to [USCIS] the adjudicative authority for Schedule A labor certification applications, the regulations at 20 CFR part 656 govern such adjudication." The frequently asked questions (FAQs) also state that applications submitted for Schedule A occupations are subject to 20 C.F.R. § 656.11(a), and therefore, substitution of a beneficiary on a Schedule A labor certification is prohibited. *Id.* While we are not bound by DOL FAQs, we may take note of them when considering issues that arise in the employment-based immigrant visa process.

the PWD indicates that the minimum educational requirement for the offered job is an associate's degree, the PWD does not support the labor certification in this case.

On appeal, the Petitioner's counsel asserts that he made a typographical error on the labor certification and cites the Board of Alien Labor Certification Appeals (BALCA)'s decision in *Matter of HealthAmerica*, 2006-PER-1 (BALCA Jul. 18, 2006), as support for his assertion that the labor certification application may be corrected.[5] However, 20 C.F.R. § 656.11(b) was amended after the issuance of the *HealthAmerica* decision and bars modifications to applications submitted after July 16, 2007. Further, while 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Finally, in any future filings, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date. *See* 8 C.F.R. § 204.5(g)(2). The record contains the Petitioner's consolidated audited financial statements for the year ending September 30, 2016. However, the priority date in this case is October 25, 2017. Thus, the 2016 audited financial statements do not cover the 2017 priority date. Further, although the Petitioner claims to employ over 100 workers, the record does not contain a letter from a financial officer of the Petitioner establishing its ability to pay the proffered wage.[6] Instead, the record contains a letter from the Petitioner's Vice President of Human Resources, who does not appear to be a financial officer of the Petitioner.

## III. CONCLUSION

The Petitioner has not established eligibility for the requested immigration benefit under Schedule A, as the PWD does not support the labor certification in this case.

**ORDER:** The appeal is dismissed.

Cite as *Matter of C-*, ID# 2647649 (AAO Oct. 9, 2019)

[5] We note that in *Matter of Sushi Shogun,* 2011-PER-02677 (BALCA May 28, 2013), the BALCA panel found that the promulgation of 20 C.F.R. § 656.11(b) precluded the employer from making changes to the offered position on the labor certification.

[6] In a case where a petitioner employs 100 or more workers, we may accept a statement from a financial officer of the organization which establishes the petitioner's ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2).