U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11284505

Date: SEPT. 22, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as a registered nurse case manager. It requests classification of the Beneficiary under the third-preference, immigrant classification for professional workers. 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" category 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, concluding that the petition was not accompanied by a proper application for labor certification as it did not include the required notice of filing posted between 30 and 180 days before filing the application.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. 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 professional nurses. *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.

II. ANALYSIS

A. Notice of Filing of the Labor Certification Application

One of the requirements to meet Schedule A eligibility is that the petitioner is required to post the position in accordance with 20 C.F.R. § 656.10(d), which provides:

(1) In applications filed under § 656.15 (Schedule A) ... the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the certifying officer as follows:

(i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment. Documentation may consist of a copy of the letter and a copy of the Application for Permanent Employment Certification form that was sent to the bargaining representative.

(ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include locations in the immediate vicinity of the wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a). In addition, the employer must publish the notice 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. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

. . .

(3) The notice of the filing of an Application for Permanent Employment Certification must:

(i) State 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.

. . .

(6) If an application is filed under the Schedule A procedures . . . the notice must contain a description of the job and rate of pay, and must meet the requirements of this section.

The petition was filed on November 13, 2019 together with a notice of filing of the labor certification application posted on the Petitioner's premises from October 22 to November 4, 2019.[1]

The Director denied the petition, as the notice of filing did not meet the requirements of 20 C.F.R. § 656.10(d)(3)(iv) because it was posted less than 30 days before filing the application.

On appeal, the Petitioner submits a letter from counsel advising that the notice of filing was posted twice, once in August 2019 and once in October 2019, but that it inadvertently submitted only the evidence of the October 2019 posting. The Petitioner also submits a document similar to page two of the notice of filing in the record, listing dates posted as August 5, 2019 to August 19, 2019.[2] However, this document is only page two of two pages, with the first page missing. Nothing shows what page two was originally attached to, that it was attached to a notice of filing, what that notice of filing said, and whether it was for the same position that the Petitioner is filing for in this matter.

The Petitioner does not submit evidence that the notice of filing met the requirements of 20 C.F.R. § 656.10(d)(3)(iv). The single page submitted with the appeal reflecting posting dates in August 2019 does not include the information required in 20 C.F.R. § 656.10(d)(3)(i)–(iii), or 20 C.F.R. § 656.10(d)(6).[3] The evidence submitted on appeal does not overcome the Director's decision and we will dismiss the appeal.

B. Other Required Initial Evidence

Because we conclude that the Petitioner did not submit a notice of filing that meets the requirements of 20 C.F.R. § 656.10(d), we need not fully address other issues evident in the record. That said, we will briefly identify additional grounds of ineligibility to inform the Petitioner that these issues should be addressed in future proceedings.

The record lacks evidence of the Petitioner's ability to pay the proffered wage from the priority date of this petition onward, here, November 13, 2019. To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of

[1] The notice of filing in the record is two pages. The job title, requirements and salary are listed on page one, and the posting dates and locations are shown on page two.

[2] On the Form I-290B, Notice of Appeal or Motion, the Petitioner marked Box 1.b. in Part 2, indicating that a brief and/or additional evidence would be submitted to this office within 30 calendar days of filing the appeal. As of this date, no brief has been received. However, we will accept the letter from counsel as having met the requirement of 8 C.F.R. § 103.3(a)(1)(v) to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

[3] Although not discussed by the Director, we find that the notice of filing is also deficient in that it does not include a statement regarding the use of in-house media, as required by 20 C.F.R. § 656.10(d)(1)(ii), and does not include an accurate description of the job opportunity, as required by 20 C.F.R. § 656.10(d)(6). We note that the notice of filing states that the job opportunity requires a minimum of two years of nursing experience, while the labor certification states that the job opportunity requires 12 months of experience in the offered position of registered nurse case manager.

> this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

The record includes only a letter from the Petitioner stating that it has more than 1 million dollars in payroll and 30 employees. Therefore, the record does not include any regulatory prescribed evidence of the Petitioner's ability to pay the proffered wage.

The record also lacks evidence that the Beneficiary meets the minimum requirements of the offered position as stated on the labor certification. The labor certification states that the offered position requires 12 months of experience as a registered nurse case manager. The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record does not include letters or other evidence demonstrating the Beneficiary's 12 months of experience as a registered nurse case manager. Therefore, the Petitioner has not demonstrated that the Beneficiary met the minimum requirements as stated on the labor certification at the time of filing.

If all required initial evidence is not submitted with the application or petition, or does not demonstrate eligibility, USCIS, in its discretion, may deny the petition. *See* 8 C.F.R. § 103.2(b)(8)(ii). Because the record does not include the initial required evidence, we will dismiss the appeal.

III. CONCLUSION

The Petitioner has not established that the labor certification included a proper notice of filing. For this reason, and the additional reasons discussed above, we will dismiss the appeal. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). The Petitioner has not met that burden.

ORDER: The appeal is dismissed.