

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Toe-Tal Family Foot Care Associates, P.C.,  
(PTAN: V32868),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-17-733

Decision No. CR5006

Date: January 9, 2018

**DECISION**

The Centers for Medicare & Medicaid Services (CMS), through its Medicare administrative contractor, revoked the Medicare enrollment and billing privileges of Petitioner, Toe-Tal Family Foot Care Associates, P.C.,<sup>1</sup> because Petitioner was not operational at the practice location on record with CMS. Specifically, the practice location on record with CMS was a mailbox at a The UPS Store® location (herein “UPS Store”). For the reasons stated herein, I affirm CMS’s revocation of Petitioner’s Medicare enrollment and billing privileges.

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<sup>1</sup> This case was originally docketed to include Mark Miller, DPM, the owner of Petitioner, as a party. Dr. Miller filed and signed the request for hearing, and the hearing request suggested that Dr. Miller’s enrollment and billing privileges had been revoked. However, the initial determination lists only Petitioner, and not Dr. Miller, and the record does not otherwise indicate that Dr. Miller’s personal Medicare enrollment and billing privileges have been revoked. *See* CMS Exhibit (Ex.) 6 at 1. Accordingly, I have directed the Civil Remedies Division to update the case caption in the Departmental Appeals Board (DAB) electronic filing system to reflect that Toe-Tal Family Foot Care Associates, P.C., is the sole petitioner.

## I. Background

Petitioner is a medical practice, and Mark Miller, DPM, is its “owner/president.” CMS Ex. 3 at 10. In connection with a revalidation request (CMS Ex. 1 at 25-27) by Noridian Healthcare Solutions (Noridian or “the contractor”), a Medicare administrative contractor, Petitioner submitted a Form CMS-855I enrollment application. CMS Ex. 1. Petitioner did not provide a physical practice location in section 4(C.) of the application, which instructs that “[a]ll locations disclosed on claims forms should be identified in this section as practice locations.” CMS Ex. 1 at 12. However, Petitioner explained in section 4(H.) that its “[p]ractice is mobile and services are rendered in patient homes and facilities.” CMS Ex. 1 at 16. On June 24, 2015, Noridian sent Petitioner an email message in which it requested “revisions and/or supporting documentation,” to include that Petitioner revise section 4(C.) of the application by “[c]omplet[ing] this section for each practice location [at which Petitioner] render[s] services to Medicare beneficiaries.” CMS Ex. 2 at 1-2 (italics omitted). Petitioner submitted the revisions by facsimile (CMS Ex. 3), and, *inter alia*, it revised its application to add a new practice location at 2604B El Camino Real, #311, in Carlsbad, California (herein “El Camino Real address”). CMS Ex. 3 at 6. Petitioner reported that this “practice location” is a “mobile services” health care facility and that it “saw [its] first Medicare patient at this practice location” in 2006. CMS Ex. 3 at 6. Dr. Miller signed the certification statement, agreeing that he had “read the contents of the application” and that “the information contained [within the application] is true, correct, and complete.” CMS Exs. 1 at 20, 42; 3 at 8.

On December 23, 2015, a site visit contractor visited Petitioner’s reported El Camino Real address, at which time she documented that the location was a UPS Store location, and not a medical office, explaining: “This is a private mail box location at a UPS Store.” CMS Ex. 5 at 1. On November 15, 2016, Noridian sent Petitioner an initial determination informing it that its Medicare enrollment and billing privileges had been revoked retroactive to December 23, 2015, the date of the failed site visit, and that it would be barred from re-enrolling as a Medicare supplier for at least two years. CMS Ex. 6. The letter stated the following, in pertinent part:

**42 [C.F.R. §] 424.535(a)(5) - On Site Review/Other Reliable Evidence that Requirements Not Met**

You are no longer operational to furnish Medicare covered items or services. A site visit conducted on December 23, 2015, at 2604 B El Camino Real Ste 311, Carlsbad, CA 92008-1205 confirmed that you are non-operational.

## **42 [C.F.R. §] 424.535(a)(9) - Failure to Report Changes**

You are no longer operational to furnish Medicare covered items or services. A site visit conducted on December 23, 2015, at 2604 B El Camino Real Ste 311, Carlsbad, CA 92008[-]1205 confirmed that you are non-operational. You did not notify the Centers for Medicare & Medicaid Services of this change of practice location as required under 42 [C.F.R. §] 424.516.

CMS Ex. 6 at 1 (emphasis in original).

On December 27, 2016, Petitioner, through its owner, submitted a request for reconsideration of the November 15, 2016 initial determination. CMS Ex. 7 at 1-3. Petitioner “implore[d]” Noridian “to reconsider the revocation of [its] privileges[,] since there is no basis for doing so[,] and allow [it] to continue [its] operations . . . .” CMS Ex. 7 at 2. Petitioner asserted that the “site visit was conducted at [its] ‘administrative mailing address’” and explained that it “ha[d] been registered with Medicare since 2004 . . . and, at the time of that . . . enrollment, [it was] enrolled with the address of [its] PO Box at 2604-B El Camino Real, #311, Carlsbad CA 92008.” CMS Ex. 7 at 1 (emphasis in original). Petitioner explained that when it used this address in subsequent revalidation applications after 2004, “there ha[d] never been a problem with th[e] address or anything else with [its] enrollment,” including its September 2015 revalidation. CMS Ex. 7 at 1. Petitioner acknowledged, however, that the El Camino Real address was “initially questioned” in 2006, but indicated that the problem had been resolved and the address approved after 10 months. CMS Ex. 7 at 1. According to Petitioner, “[n]othing ha[d] changed in the last 10-12 years, except [it was] now with Noridian . . . .” CMS Ex. 7 at 1. Petitioner claimed that it had “NOT failed to report any changes” and, in fact, had “NOT changed ANYTHING, AT ALL,” and thus “never had a reason to notify Noridian of any changes . . . .” CMS Ex. 7 at 1-2 (emphasis in original).

On March 8, 2017, Noridian issued an unfavorable reconsidered determination. CMS Ex. 8. The reconsidered determination stated the following:

Revocation Reason: 42 [C.F.R. §] 424.535(a)(5)

### **On-Site Review/Other Reliable Evidence that Requirements Not Met**

**You are no longer operational to furnish Medicare covered items or services. A site visit conducted on December 23, 2015 at 2604 B El Camino Real Ste. 311, Carlsbad, CA 92008-1205 confirmed that you are non-operational.**

Revocation Reason: 42 [C.F.R. §] 424.535 (a)(9)

### **Failure to Report Changes**

**You are no longer operational to furnish Medicare covered items or services. A site visit conducted on December 23, 2015 at 2604 B El Camino Real Ste. 311, Carlsbad, CA 92008-1205 confirmed that you are non-operational. You did not notify [CMS] of this change of practice location as required under 42 [C.F.R. §] 424.516.**

CMS Ex. 8 at 1 (emphasis in original). The reconsidered determination explained that “Toe-Tal Family Footcare Associates had not provided evidence to show full compliance with the standards for which [it was] revoked.” CMS Ex. 8 at 2.

Petitioner, through Dr. Miller, submitted a request for hearing (RFH) by an administrative law judge (ALJ) on May 5, 2017, which my office received on May 10, 2017.<sup>2</sup> Thereafter, ALJ Scott Anderson issued an Acknowledgment and Pre-Hearing Order (Pre-Hearing Order) in which he directed the parties to each file a pre-hearing exchange consisting of a brief and supporting documents by specified deadlines.<sup>3</sup> Pre-Hearing Order, § 4. Judge Anderson also instructed the parties to submit written direct testimony for any witnesses in lieu of in-person direct testimony, and explained that a hearing would only be necessary for the purpose of cross-examination of witnesses. Pre-Hearing Order, §§ 8-10.

In response to the Pre-Hearing Order, CMS filed a brief and motion for summary judgment (CMS Br.), along with eight exhibits (CMS Exs. 1-8). Petitioner filed a combined brief and response to CMS’s motion for summary judgment (P. Br.), and two exhibits (P. Exs. 1-2). Petitioner also objected to CMS Exs. 5 and 7. P. Br. at 11-13. CMS filed objections to both of Petitioner’s exhibits (CMS Objections).

Petitioner argues that CMS Ex. 5 is “essentially an unsigned witness statement,” and that CMS Ex. 7 is an “unsigned witness statement,” and that both are inadmissible. P. Br. at 11-13. I point out that evidence is admissible in this proceeding so long as it is “relevant and material.” 42 C.F.R. § 498.60(b)(1). I may admit evidence that is relevant and material “even though inadmissible under the rules of evidence applicable to court procedure.” 42 C.F.R. § 498.61. Although I am not required to apply the Federal Rules of Evidence in deciding whether to admit evidence, I find instructive the test for

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<sup>2</sup> Petitioner subsequently retained counsel.

<sup>3</sup> This case was reassigned to me on August 25, 2017, following Judge Anderson’s departure from the DAB. *See* 42 C.F.R. § 498.44(b).

relevance found in Rule 401. Rule 401 provides that “[e]vidence is relevant if: . . . it has any tendency to make a fact more or less probable than it would be without the evidence; and . . . the fact is of consequence in determining the action.” With this standard in mind, I turn to the parties’ evidentiary objections.

I find no merit in Petitioner’s objections. Petitioner argues that CMS Ex. 7 “cannot be considered by this court as it fails to meet the most basic requirements for admissibility and must be excluded.” P. Br. at 13. However, Petitioner, whose owner, Dr. Miller, authored the letter at pages 1-2 of CMS Ex. 7 that is the focus of Petitioner’s objection, does not challenge the *authenticity* of that letter. Nor does Petitioner deny that its own *owner* authored the letter that is the basis for its objection. Further, I note that the request for reconsideration is an important *procedural* document in this case, in that I would lack jurisdiction to hear this case if Petitioner had not filed a timely request for reconsideration. *See* 42 C.F.R. §§ 498.22(b); 498.40(a). Importantly, and contrary to Petitioner’s flawed understanding of the substance of this document, it is neither a witness statement nor testimony; it is simply a *letter* from Petitioner’s owner to the Medicare administrative contractor. Additionally, this letter *is* the request for reconsideration, and therefore, consideration of this letter aids my determination of whether Noridian appropriately upheld the revocation of Petitioner’s enrollment and billing privileges when it issued the reconsidered determination.

CMS Ex. 5 is a report by the site visit contractor, and Petitioner likewise contends it is inadmissible “on the grounds that it is an unsigned statement.” P. Br. at 11. Petitioner is correct that the site visit contractor did not sign CMS Ex. 5, and it is unclear to me why CMS would submit an unsigned version of this document as supporting evidence.<sup>4</sup> However, Petitioner does not dispute the critical information contained in the report: a site visit contractor visited the El Camino Real address and determined that the location is a UPS Store and not a medical office. In fact, Petitioner’s arguments focus on the fact that the El Camino Real address is a special payments address, rather than a practice location. P. Br. at 6-7. Absent any dispute by Petitioner that the unsigned site visit report contains inaccurate information, Petitioner has presented no basis for me to refuse to admit it into evidence. I reiterate that I may consider any evidence that is relevant and material, even hearsay evidence, that would be inadmissible under the Federal Rules of Evidence. 42 C.F.R. § 498.61 (“Evidence may be received at the hearing even though inadmissible under the rules of evidence applicable to court procedure.”); 42 C.F.R. § 498.60(b)(3) (“The ALJ inquires fully into all of the matters at issue, and receives in evidence the testimony of witnesses and any documents that are relevant and material.”).

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<sup>4</sup> I caution CMS that, under different circumstances, a less favorable outcome could result from a petitioner’s appeal as a result of CMS’s failure to submit a signed site verification report.

Further, as I will explain below, it is unnecessary for me to rely on CMS Ex. 5 to uphold the revocation of Petitioner's Medicare enrollment and billing privileges.

CMS objects to the written direct testimony Petitioner submitted for Dr. Miller (P. Ex. 1) and its practice manager, Deborah Melendez (P. Ex. 2). CMS Objections at 2-5. CMS argues that the testimony is not relevant, is argumentative, and is inconsistent with other statements by Petitioner. I overrule CMS's objections to P. Exs. 1 and 2; the Pre-Hearing Order offered both parties an opportunity to submit "the complete, written direct testimony of any witness," and I will not hold Petitioner's witness testimony, submitted in compliance with the order, inadmissible. While portions of the testimony are irrelevant, the testimony provides Petitioner's basis, as explained by two individuals involved in the submission of Petitioner's enrollment application, for its belief that its enrollment and billing privileges should not have been revoked.

I overrule both parties' objections, and I admit all the submitted exhibits (CMS Exs. 1-8 and P. Exs. 1-2) into the record. I consider the record to be closed and the matter ready for a decision on the merits.<sup>5</sup>

## **II. Issue**

Whether CMS had a legal basis to revoke Petitioner's Medicare enrollment and billing privileges because Petitioner was not operational at the practice location on file with CMS and did not timely report a change in practice location.

## **III. Jurisdiction**

I have jurisdiction to decide this case. 42 C.F.R. §§ 498.3(b)(17), 498.5(l)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

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<sup>5</sup> In its objections, CMS stated, "[s]hould Petitioner's proposed exhibits and witnesses be approved, CMS requests to cross-examine Petitioner's proposed witnesses." CMS Objections at 2. I have admitted Petitioner's witness testimony even though it is minimally relevant to the issues before me. Specifically, the issue at hand involves whether the practice location address reported in Petitioner's enrollment record *at the time of the failed site visit on December 23, 2015*, was operational at the time of the site visit. The testimony of Petitioner's witnesses does not yield evidence sufficient to refute that Petitioner listed a non-operational practice location, the El Camino Real address, as a physical practice location in its enrollment application. Therefore, I do not rely on Petitioner's testimony in upholding the revocation, and accordingly, cross-examination of Petitioner's witnesses by CMS would be futile. As an in-person hearing to cross-examine witnesses is not necessary, it is unnecessary to further address CMS's motion for summary judgment.

#### IV. Findings of Fact, Conclusions of Law, and Analysis<sup>6</sup>

Petitioner is a “supplier” for purposes of the Medicare program. *See* 42 U.S.C. § 1395x(d); 42 C.F.R. §§ 400.202 (definition of supplier), 410.20(b)(1). In order to participate in the Medicare program as a supplier, entities must meet certain criteria to enroll and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510. CMS may revoke the enrollment and billing privileges of a supplier for any reason stated in 42 C.F.R. § 424.535. When CMS revokes a supplier’s Medicare billing privileges, CMS establishes a re-enrollment bar for a period ranging from one to three years. 42 C.F.R. § 424.535(c). Generally, a revocation becomes effective 30 days after CMS mails the initial determination revoking Medicare billing privileges, but if CMS finds a supplier to be non-operational, as it did here, the revocation is effective from the date that CMS determines that the supplier was not operational. 42 C.F.R. § 424.535(g).

On-site review is addressed in 42 C.F.R. § 424.535(a)(5). Pursuant to subsection 424.535(a)(5)(i), a supplier is non-operational if CMS determines “[u]pon on-site review or other reliable evidence” that it is “[n]o longer operational to furnish Medicare-covered items or services.”

***1. Petitioner’s practice location on file as of December 23, 2015, the date of the failed site visit, was 2604B El Camino Real, #311, Carlsbad, California 92008-1205.***

On or about March 17, 2015, Petitioner submitted a hard copy Form CMS-855I, in which it did not list a practice location. CMS Ex. 1 at 13, 34. On June 24, 2015, Noridian sent an email to Petitioner’s designated contact person, at which time it requested that Petitioner provide “revisions and/or supporting documentation” that were necessary for Noridian to complete the processing of the application. CMS Ex. 2 at 1. As relevant here, Noridian requested that Petitioner provide practice location information “for each practice locations you render services [sic] to Medicare beneficiaries.” CMS Ex. 2 at 2. In response, Petitioner reported a sole practice location address of 2604B El Camino Real #311, Carlsbad, CA 92008-1205. CMS Ex. 3 at 6.

Petitioner argues the El Camino Real address “is specifically NOT listed as a Practice Location” on its March 2015 application and is instead listed only in the “Special Payments’ Section 4E” of the application. P. Br. at 6-7 (citing, *inter alia*, CMS Ex. 1). In citing to its initial application that required revisions (CMS Ex. 1), and its witness testimony (P. Exs. 1 and 2), Petitioner overlooks the fact that it failed to report *any* practice location in its initial application. P. Br. at 6-7. Upon a request by Noridian that Petitioner revise its application to include the practice location information required in section 4(C.) of the application, Petitioner informed Noridian that its practice location

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<sup>6</sup> My numbered findings of fact and conclusions of law appear in bold and italics.

was the El Camino Real address. CMS Ex. 3 at 6. Petitioner does not allege that it reported any other practice locations at that time, nor does it submit any evidence of such. Nor does Petitioner allege it did so at any time prior to the failed site visit on December 23, 2015. Therefore, the practice location on file with Noridian as of December 23, 2015, was the El Camino Real address.<sup>7</sup>

**2. *The practice location on file with Noridian at the time of the December 23, 2015 site visit was a commercial mailbox at a UPS Store, and not a physical practice location.***

According to CMS, it is undisputed that “Noridian determined that the address listed as Petitioner’s practice location was a Mail Service Center.” CMS Br. at 3. In its reconsidered determination, Noridian stated that Petitioner’s “revocation will be upheld due to a PO Box being listed in section 4C as a practice location.” CMS Ex. 8 at 2. According to the site verification survey report, the El Camino Real address is a mailbox at a UPS Store. CMS Ex. 5. Petitioner conceded in its hearing request that the El Camino Real address is “a P.O. Box.”<sup>8</sup> RFH at 1-2. In its request for reconsideration, Petitioner even stated that it “ha[s] been registered with Medicare since 2004 . . . and, at the time of that . . . enrollment, we were enrolled with the address of our PO Box at 2604-B El Camino Real, #311, Carlsbad[,] CA 92008.”<sup>9</sup> CMS Ex. 7 at 1.

**3. *CMS had a legal basis to revoke Petitioner’s Medicare enrollment and billing privileges because it was not operational pursuant to 42 C.F.R. § 424.535(a)(5) at the practice location on file with CMS.***

A supplier is “operational” when it:

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<sup>7</sup> I note that although Petitioner now claims in this proceeding that it “is a strictly a [sic] ‘house call’ practice” (P. Br. at 4), that is not what Petitioner reported to CMS in its revalidation application. Petitioner explained that its “services are rendered in patient homes *and facilities*.” CMS Ex. 1 at 16 (emphasis added). Under even a liberal construction of the term “house call,” the rendering of services in facilities, particularly on a routine basis, is not a “house call.” The application’s instructions clearly instructed Petitioner to list “each of [its] practice locations where [it] render[s] services to Medicare beneficiaries.” CMS Ex. 1 at 12.

<sup>8</sup> I reiterate that although the site visit contractor did not sign CMS Ex. 5, Petitioner concedes that the location visited was a commercial mailbox at a UPS Store.

<sup>9</sup> This is consistent with the testimony of Petitioner’s owner, who acknowledged that he listed the El Camino Real address as a special payments address on Petitioner’s first enrollment application and that “Noridian did a site inspection of this location in October 2006, [and] found it to be a P.O. [ ]Box . . . .” P. Ex. 1 at 3.

has a qualified physical practice location, is open to the public for the purpose of providing health care related services, is prepared to submit valid Medicare claims, and is properly staffed, equipped, and stocked (as applicable based on the type of facility or organization, provider or supplier specialty, or the services or items being rendered) to furnish these items or services.

42 C.F.R. § 424.502. CMS may revoke a currently enrolled supplier's Medicare billing privileges in the following circumstance:

Upon on-site review or other reliable evidence, CMS determines that the provider or supplier is . . . :

- (i) No longer operational to furnish Medicare-covered items or services.

42 C.F.R. § 424.535(a)(5)(i).

The regulatory definition of the term “operational” refers to the “qualified physical practice location” of a supplier. 42 C.F.R. § 424.502. The instructions on Petitioner's revalidation application specifically instruct applicants, “Each practice location must be a specific street address as recorded by the United States Postal Service. *Do not report a P.O. Box.*” CMS Ex. 1 at 12 (emphasis added); *see also* CMS Ex. 3 at 6 (“Practice Location Street Address Line 1 (*Street Name and Number – NOT a P.O. Box*)”) (emphasis in original). When Petitioner revised its March 2015 revalidation application in June 2015, in response to Noridian's request that it revise its application, Petitioner reported the El Camino Real address as its sole physical practice location, and reported that the address was for an “[o]ther health care facility” at which it was providing “mobile services.” CMS Ex. 3 at 6. Petitioner's owner certified that the contents of the application and the later revisions were “true, correct, and complete.” CMS Exs. 1 at 20, 42; 3 at 8. Petitioner later conceded, however, that the El Camino Real address, for more than a decade, was a UPS Store location. CMS Ex. 7 at 1.

Because the physical practice location on file with CMS was a commercial mailbox, and not a private office or medical facility, CMS had a legal basis to revoke Petitioner's enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(5)(i). CMS asserts that the UPS Store address is not an operational practice location, and Petitioner does not demonstrate otherwise. CMS Br. at 4. Further, Petitioner does not contend that it reported any other practice location prior to the date of the failed site visit on December 23, 2015. Therefore, Petitioner was not operational at the El Camino Real address that was reported as the practice location on its enrollment application; even if Petitioner was operational elsewhere, it was not operational at the sole practice location reported on its

enrollment application. *See Care Pro Home Health Care*, DAB No. 2723 at 6 (2016) (holding that CMS lawfully revoked a supplier’s Medicare enrollment based on its non-operational status at a single location); *see also Viora Home Health, Inc.*, DAB No. 2690 at 13 (2016) (holding that CMS properly revoked a supplier’s Medicare enrollment when a practice location of record was not operational upon onsite review).

Notwithstanding the foregoing, Petitioner argues that CMS lacked the authority to revoke its Medicare enrollment and billing privileges because it did not offer admissible evidence that it conducted a site visit of the El Camino Real address. Even without consideration of the site visit report that Petitioner disputed (CMS Ex. 5), Petitioner has not cited any authority that *requires* a failed site visit in such an instance where the party concedes that it was not operational at the physical practice location listed on its enrollment application (and has not been for more than a decade). Petitioner has offered no evidence that it provided any address, other than the El Camino Real address, as a practice location prior to the December 23, 2015 site visit. In fact, Petitioner concedes the El Camino Real address was a mailbox at a UPS store, and therefore, a site visit was not necessary to confirm that Petitioner was not operational at the UPS Store location.

Finally, Petitioner argues it should be granted relief based on equity, in that the revocation has caused significant hardship. P. Br. at 8-11. Petitioner asserts that its failure to accurately complete its enrollment application is “at most . . . a technical failure to fill out forms correctly,” while revocation based on that “technical failure” would cause a “collateral loss of employment for five physicians, fifteen non-physician employees, and medical abandonment of 2,388 patients.” P. Br. at 10. I am unable to grant equitable relief. *US Ultrasound*, DAB No. 2302 at 8 (2010) (“Neither the ALJ nor the [DAB] is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements.”). Because Petitioner listed a practice location on its enrollment application at which it was not operational, and it did not list the locations where it actually provides services, CMS had a legal basis to revoke its enrollment.

***4. Petitioner failed to notify CMS or its administrative contractor of a change in practice location within 30 days of the location change.***<sup>10</sup>

While Petitioner does not specifically address the basis for its revocation under 42 C.F.R. § 424.535(a)(9), I will construe that Petitioner disputes this basis. The regulations at 42 C.F.R. § 424.516(d)(1)(iii) require that physician and nonphysician practitioner

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<sup>10</sup> I recognize that the fact that Petitioner was non-operational at the El Camino Real address, alone, is a sufficient basis for CMS to revoke its Medicare enrollment and billing privileges. I will nonetheless briefly address Petitioner’s failure to timely report the location change for its practice.

