



U.S. Citizenship  
and Immigration  
Services

02

[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **OCT 20 2004**

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

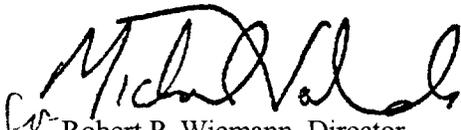
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

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prevent unauthorized  
invasion of privacy

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**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.<sup>1</sup> The appeal will be dismissed.

The petitioner is a chiropractic clinic. It seeks to employ the beneficiary permanently in the United States as a physical therapist. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The director denied the petition after determining that the beneficiary was not qualified for the position as there was no evidence of an unrestricted state license to practice physical therapy, or a letter from an authorized state licensing official in the state of the beneficiary's intended employment stating that the beneficiary is qualified to take that state's licensing examination for physical therapists.

On appeal, counsel submits additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a physical therapist on October 28, 2002. Aliens who will be permanently employed as physical therapists are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.10 for which the Director of the United States Employment Service has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed. Also, according to 20 C.F.R. § 656.10, aliens who will be permanently employed as physical therapists must possess all the qualifications necessary to take the physical therapist licensing examination in the [s]tate of intended employment.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA-750 at Part A) in duplicate with the appropriate CIS office. Pursuant to 20 C.F.R. § 656.22, the Application for Alien Employment Certification shall include:

1. Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.
2. Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

With the initial petition, the petitioner provided a letter from the petitioner's president stating that he is authorized in the state of California "to do physical therapy" and declaring that "[REDACTED]" a person unknown to the instant petition, is qualified to take the state licensing examination to become a physical therapist. The petitioner also provided a copy of the "1994 Laws and Regulations Relating to the Practice of Chiropractic" with an excerpted section on what a licensed chiropractor is authorized to do in the state of California accompanied by a copy of the petitioner's president's license to practice chiropractic. The petitioner also submitted copies of the

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<sup>1</sup> The petitioner previously filed the same petition (WAC-02-163-53708), which was denied for the same reason the director denied this subsequent petition. Apparently the petitioner did not appeal that denied petition and chose to re-file instead.

beneficiary's academic accolades, employment experience and "pre-professional training" letters, and copies of the petitioner's financial information establishing its ability to pay the proffered wage.<sup>2</sup>

Because the evidence was insufficient to adjudicate the petition, the director issued a request for evidence on January 22, 2003 requesting a letter or statement provided by an "authorized state physical therapy licensing official in the state of [the] beneficiary's intended employment noting that the beneficiary is qualified to take that state's licensing examination for physical therapists, or provide a copy of the beneficiary's state license." The director also inquired about the prevailing wage rate for the proffered position. Stating that the proffered wage on the Form ETA 750, which was not certified by the U.S. Department of Labor (DOL), appeared lower than the prevailing wage rate for the area of intended employment, the director requested evidence that the proffered wage was the prevailing wage rate.<sup>3</sup>

In response to the director's request for evidence, the petitioner provided a Prevailing Wage Request Form completed by the State of California's Employment Development Department (CA EDD). The petitioner indicated that the proffered position of Physical Therapist, requiring two years of experience but not supervisory responsibilities, would be paid \$11.50 per hour. The petitioner wrote the same job description and all terms as set forth on the Form ETA 750-A that was submitted with the petition. The CA EDD established that the proffered position was a Level II Physical Therapist position and the prevailing wage rate would be \$36.71 per hour. No other evidence or statement from the petitioner or counsel accompanies the response to the director's request for evidence clarifying that the petitioner amended its proffered wage or took other corrective action to conform its proffered wage to the prevailing wage rate.

Also in response to the director's request for evidence are letters from chiropractors, one from the petitioner's president, [REDACTED] D.C., and one from [REDACTED] D.C. stating that they are authorized to "do physical therapy," and declaring that the beneficiary is qualified to "take the state licensing examination to become a physical therapist." Accompanying their letters are excerpts from the following materials: "Laws and Regulations Relating to the Practice of Chiropractic," published by the State of California's Board of Chiropractic Examiners; a highlighted provision of the Laws and Regulations Relating to the Practice of Chiropractic, namely § 302.(a)(2) stating that a licensed chiropractor may perform "physical therapy techniques in the course of chiropractic manipulations and/or adjustments"; [REDACTED] license to practice chiropractic; "Physical Therapy Corporation Ownership By a [REDACTED]" published by the Physical Therapy Board of California; and "Business and Professions Code Section 2620-2622," apparently legal provisions perhaps issued by the state of California defining the physical therapy practice.

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<sup>2</sup> Although the director only identified one issue for denying the petition, there are multiple issues that will be discussed in this decision below. However, the petitioner did clearly and unequivocally establish its ability to pay the proffered wage with tax returns reflecting net income of \$260,792 in 2000 and \$301,508 in 2001. See *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Although the petitioner offered a proffered wage below the prevailing wage rate, which will be discussed in the decision below, their net income covers the prevailing wage rate, of \$76,356.80, for a Level II Physical Therapist in the state of California in Orange county.

<sup>3</sup> The director also requested evidence, and the petitioner responded with relevant evidence, to prove the petitioner's ability to pay the proffered wage, which, as noted above in footnote 2, has been established and will not be discussed further in this decision.

The director denied the petition on June 4, 2003 for failure to produce proof that the beneficiary holds an unrestricted state license to practice physical therapy, or a letter from an authorized state licensing official in the state of the beneficiary's intended employment stating that the beneficiary is qualified to take that state's licensing examination for physical therapists.

On appeal, the petitioner's president provides a letter stating that they are providing new evidence by an "authorized state physical therapists licensing official in the state of California, stating that the beneficiary is qualified to take the state licensing examination for physical therapist." Accompanying that letter is a letter from [REDACTED] who states that she is authorized in the state of California to "do physical therapy" and declaring that the beneficiary is qualified to take the state licensing examination to become a physical therapist. Also attached is a print out from a website showing that [REDACTED] holds a Physical Therapist Assistant license valid until November 30, 2003 in the county of San Bernardino in California.

Counsel and the petitioner fail to grasp the concept that all of the evidence they have submitted to date are issued by chiropractors and a physical therapy assistant, none of whom are officials of the State of California's physical therapy licensing governing entity. None of this evidence conforms to the regulatory requirement set forth at 20 C.F.R. §§ 656.10 and 656.22(c)(1). The petitioner and counsel have not submitted any evidence that the beneficiary has ever sought a license to practice physical therapy. The petitioner and counsel further confuse the issue by submitting regulatory materials pertaining to chiropractics. While the petitioner's job description of the proffered position states that the physical therapy would relate to chiropractic treatments, the position is for a physical therapist, not a health care professional in the field of chiropractics who would perform some physical therapy in connection with chiropractic treatments. None of the regulatory excerpts accompanying the petitioner's evidentiary submissions clarify the beneficiary's eligibility to obtain a license in the state of California to practice physical therapy as envisioned by the governing regulatory requirements for this visa preference petition at 20 C.F.R. §§ 656.10 and 656.22(c)(1). The letters from practitioner chiropractors and physical therapy assistants do nothing to support the evidentiary requirements of this petition.

Because the petitioner failed to prove that the beneficiary holds an unrestricted state license to practice physical therapy, or a letter from an authorized state licensing official in the state of the beneficiary's intended employment stating that the beneficiary is qualified to take that state's licensing examination for physical therapists as required by 20 C.F.R. §§ 656.10 and 656.22(c)(1), the petition cannot be approved for that reason.

Beyond the decision of the director, there are additional reasons why this petition cannot be approved. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

First of all, although the director sought information concerning the prevailing wage rate, he inexplicably failed to mention that the evidence provided by the petitioner unequivocally established that the proffered wage is considerably lower than the prevailing wage rate. CIS has the authority to review the petitioner's proffered wage for compliance with the DOL's prevailing wage rates. *See* 20 C.F.R. § 656.22(e). DOL maintains a website at [www.ows.doleta.gov](http://www.ows.doleta.gov) which provides access to an Online Wage Library (OWL). OWL provides prevailing wage

rates for occupations based on the location of where the occupation is being performed geographically. The prevailing wage rates are broken down into two skill levels. General Administration Letter (GAL) 2-98 (DOL), "DOL Issues Guidance on Determining OES Wage Levels" and Training and Employment Guidance Letter (TEGL) No. 5-02 (DOL) provide guidance on appropriate skill level categorization. The job title and corresponding job description in this case indicate that it is a Level 2 position because the proffered position of physical therapist requires two years of experience. OWL reports that for 2002, the year of the petition's priority date, the prevailing wage rate for a Level 2 physical therapy position was \$37.47 per hour. The petitioner's proffered wage for the proffered position is \$11.50 per hour, which is less than the prevailing wage rate. While DOL regulations allow for the proffered wage to come within 95% of the prevailing wage, the instant petition's proffered wage does not fall within that threshold. See 20 C.F.R. § 656.40(a)(2)(i). Additionally, the petitioner itself provided evidence from the CA EDD that established the prevailing wage rate for the year 2003 at \$36.71 per hour, a considerable difference from the \$11.50 offered by the petitioner. Thus, the petitioner is not offering the prevailing wage rate in violation of 20 C.F.R. § 656.40 and the petition cannot be approved for this reason.

Another reason why the petition cannot be approved is the petitioner's failure to prove the beneficiary's qualifications for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is October 28, 2002. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	Blank
	Grade School	Blank
	High School	Blank
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank

According to the terms of the labor certification application, the applicant must have two years of training in order to perform the job duties listed in Item 13, which states the following: "Plans and administers chiropractic prescribed physical therapy treatment for patients [sic] suffering from injuries [sic], or muscle, nerve, joint and bone diseases, to restore function, relieve pain, and prevent disability; reviews chiropractic referral (prescription [sic]) and patient's [sic] conditions and medical record to determine physical therapy treatment required." Item 15 indicates that there are no special requirements.

The beneficiary set forth her credentials on Form ETA-750B and signed a declaration that the form's contents were accurate under penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she indicated that she was employed as a "physical therapy" from January 1998 through March 2000 at the National University of Engineering in Lima, Peru and as a "physical therapy" from April 2000 through January 2001 at the Institute of Gerontology and Geriatrics in Lima, Peru.

Accompanying the petitioner's initial petition are letters from the National University of Engineering and Institute of Gerontology and Geriatrics, both in Lima, Peru, confirming the dates of employment set forth by the beneficiary on

Form ETA-750B but calling that employment “practical Pre-Professional training” in “the specialty of Technician in Physiotherapy and Rehabilitation” on two days per week under tutelage. No description of duties is provided, but clearly these letters verify part-time training at best as a “technician,” not a full-time physical therapist.

The beneficiary did not list any other employment experiences on the Form ETA-750B. The contents of the form ETA-750B are the same as the contents of the same form submitted with the petitioner’s previously denied petition as detailed above in footnote 1. Additionally, the beneficiary submitted an application to adjust status to lawful permanent resident in October 2002 with an accompanying Form G-325, Biographic Information sheet that stated her last employment as a physical therapist with the National University in Lima, Peru from January 1998 to October 2002. No other employment experience is listed. The form was signed under a notice informing the beneficiary that there are severe penalties for falsifying information.

An additional employment experience letter was submitted with this petition. The translated experience letter is on the letterhead of Maria Auxiliadora Hospital Clinic, dated May 31, 2001, and states the following certification by an administrator: “The Administrator of the Clinic of Maria Auxiliadora hereby Certifies that [the beneficiary], worked at this Institute as Technician in Physiotherapy and Rehabilitation from April 1, 1999 to April 30, 2001.” The letter does not provide any additional details of a job description.

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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

At the outset, the employment experience letter from Maria Auxiliadora Hospital Clinic fails to conform to the regulatory requirements set forth at 8 C.F.R. § 204.5(l)(3) because the letter fails to provide a description of the beneficiary’s experience. The letter simply states that the beneficiary worked as a technician. A technician is not the same occupation as a physical therapist, which is the occupational experience required by the proffered position. However, there is no way to discern the beneficiary’s detailed employment experience at the Maria Auxiliadora Hospital Clinic anyway since no detailed job description was provided.

Additionally, the beneficiary never set forth an employment experience at the Maria Auxiliadora Hospital Clinic on pertinent and relevant immigration forms raising suspicions concerning the credibility of this evidence. She omitted it three times on three pertinent and relevant immigration forms that she declared were true under penalty of perjury. These omissions produce an inconsistent factual assertion that requires a clarifying explanation prior to acceptance of the letter from the Maria Auxiliadora Hospital Clinic as a credible and probative piece of evidence.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Thus, because the petitioner has failed to establish that the beneficiary is qualified to perform the proffered position with consistent and competent evidence, in violation of at 8 C.F.R. § 204.5(l)(3), the petition cannot be approved.

A final reason why the petition cannot be approved is the petitioner's failure to conform to the regulatory requirements at 20 C.F.R. § 656.20(g)(1). The employer must also comply with the procedure set forth to post the availability of the job opportunity to interested U.S. workers. The regulation at 20 C.F.R. § 656.20(g)(1) provides:

In applications filed under §§ 656.21 (Basic Process), 656.21a (Special Handling) and 656.22 (Schedule A), the employer shall document that notice of the filing of the application for Alien Employment Certification was provided:

- (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.
- (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 shall be posted for at least 10 consecutive days. The notice shall be clearly visible and unobstructed while posted and shall 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, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a)

If an application is filed under the Schedule A procedures, the notice must contain a description of the job and rate of pay, must state that the notice is being provided as a result of a filing of an application for a permanent alien labor certification, and must state that any person may provide documentary evidence relevant to the application to the local DOL employment service office and/or to the regional DOL certifying officer. 20 C.F.R. § 656.20(g)(8); 20 C.F.R. §§ 656.20(g)(3)(ii) and (iii).

The petitioner did not provide any evidence of a posting notice that conforms to the regulatory requirements set forth at 20 C.F.R. §§ 656.20(g)(1), (g)(8), (g)(3)(ii) and (iii), and 656.22, and thus the petition must be denied for that reason.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.