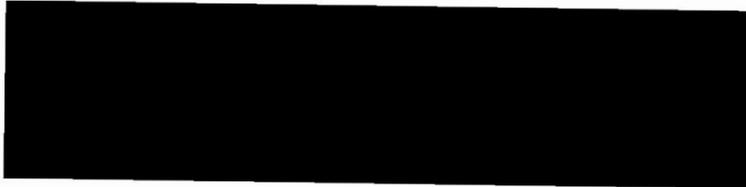




U.S. Citizenship
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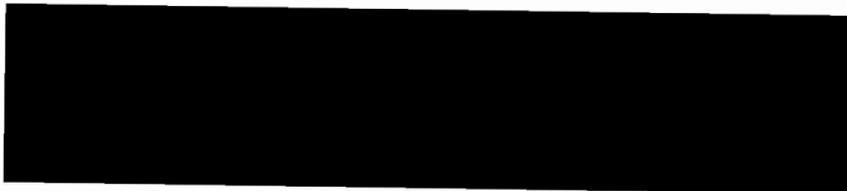
B6

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **MAY 09 2006**
WAC-03-145-53372

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:



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, Chief
Administrative Appeals Office

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

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner provides physical therapy services. It seeks to employ the beneficiary permanently in the United States as a physical therapist. The petitioner asserts that the beneficiary qualifies for a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA-750) with the Immigrant Petition for Alien Worker (I-140). The director determined that the petitioner had not submitted evidence that notice was posted in accordance with 20 C.F.R. § 656.20(g)(1) and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits a brief statement and additional evidence.¹

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

In this case, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as a physical therapist. Aliens who will be employed as physical therapists are listed on Schedule A. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.10 with respect to 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.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be “accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien’s occupation qualifies as a shortage occupation within the Department of Labor’s Labor Market Information Pilot Program.” The priority date of any petition filed for classification under section 203(b) of the Act “shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [Citizenship and Immigration Services (CIS)].” 8 C.F.R. § 204.5(d). Here, the priority date is May 2, 2003.

The regulations set forth in Title 20 of the Code of Federal Regulations also provide specific guidance relevant to the requirements that an employer must follow in seeking certification under Group I of Schedule A. An employer must file an application for a Schedule A labor certification with CIS. It must include evidence of prearranged employment for the alien beneficiary signified by the employer’s completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director’s decision. The evidence submitted for the first time on appeal will then be considered.

Application for Alien Employment Certification to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.20(g)(3) and 20 C.F.R. §§ 656.22(a) and (b).

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)(1)(i) and (ii), 20 C.F.R. §§ 656.20(g)(3)(ii) and (iii), and 20 C.F.R. § 656.20(g)(8).

With the petition the petitioner did not submit any documentation regarding the notice of the filing. Therefore, on October 14, 2003 the director issued a request for addition evidence (RFE), especially requesting for evidence under Schedule A Physical Therapists Notice of Filing Requirement. The RFE states in pertinent part:

Submit evidence to establish that a notice of filing the application for Alien Employment Certification (Form ETA-750) was provided to the bargaining representatives or the petitioner's employees. If the notice of filing is provided to the bargaining representatives, the petitioner must show that the notice relates to the occupational classification for which certification of the job opportunity is sought in the petitioner's location in the area of intended employment. If there is no such bargaining representatives, the petitioner must show that the notice was posted to the employees at the facility or location of the intended employment. Also, the notice must be posted for at least 10 consecutive days in an unobstructed and conspicuous place where the petitioner's U.S. workers can readily read.

In response to the RFE, counsel explained that the petitioner had no union and no bargaining representatives. Counsel submitted a Certification of Posting of Employment Opportunity executed by [REDACTED] CEO of the petitioner and a posting of job opportunity.

The director denied the petition on March 4, 2004 finding that the notice was posted from August 1, 2003 to October 30, 2003, after the filing of this petition, therefore, the petitioner did not qualify for Schedule A certification of the Form ETA 750.

On appeal, counsel asserts that there is a typographical error on the certification of posting of employment opportunity from [REDACTED] i and submits two declarations from [REDACTED] and [REDACTED] who typed the certification, attesting that the notice was posted from August 1, 2001 instead of August 1, 2003.

Both declarations are on plain paper in the same format. They are not sworn and not notarized. The declarations that have been provided on appeal are not affidavits as they were not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a motion are not evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Furthermore, none of the declarations is supported with any documentary evidence that when the petitioner started recruitment and preparation of the petition on behalf of the beneficiary, nor do they explain why the petitioner started posting the notice almost

two years before the filing and the posting lasted almost two years. “Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition;” “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.” See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The record of proceeding contains the posting notice submitted as evidence of the posting. However, the posting appears to be an ordinary job announcement rather than a notice of filing. It does not contain a description of the job, does not state that the notice is being provided as a result of a filing of an application for a permanent alien labor certification, and nor does it 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 as required at 20 C.F.R. § 656.20(g)(8), 20 C.F.R. §§ 656.20(g)(3)(ii) and (iii). Therefore, the notice of filing would not have met the regulatory requirements even if it had been posted prior to the filing.

Therefore, counsel’s assertion on appeal cannot overcome the director’s decision and evidence submitted with appeal is not sufficient to establish that the petitioner did qualify for Schedule A certification of the Form ETA 750 with evidence that the employer had provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer’s employees under the regulations.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.