

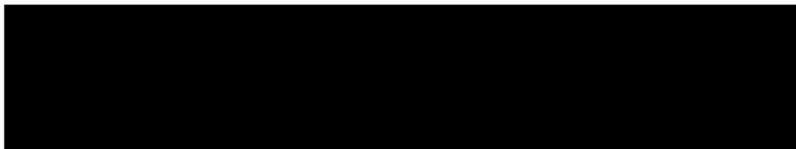


U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

B6



FILE:



Office: VERMONT SERVICE CENTER

Date: JAN 22 2008

EAC 06 011 51626

IN RE:

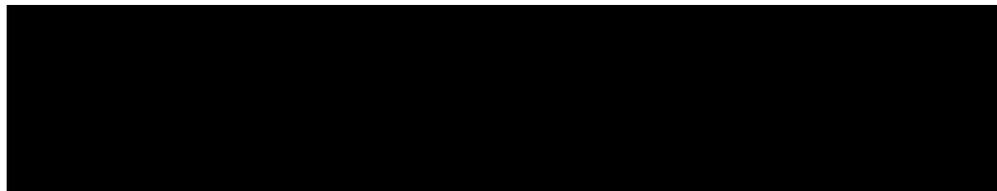
Petitioner:

Beneficiary:



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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a physical therapy provider. 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. § 656.5, Schedule A, Group I. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 or labor certification) accompanied the petition. The director determined that the petitioner had failed to file the preference visa petition within the validity period of the prevailing wage determination and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and maintains that the petitioner's petition was consistent with the applicable requirements and that the petition should be approved.<sup>1</sup>

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Immigrant Petition for Alien Worker (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 September 30, 2005.

The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. Therefore these regulations apply to this case because the filing date is September 30, 2005.

---

<sup>1</sup> The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The regulation at 20 C.F.R. § 656.15(c) provides:

*Group I documentation.* An employer seeking labor certification under Group I of Schedule A must file with DHS, as part of its labor certification application, documentary evidence of the following:

- (1) An employer seeking Schedule A labor certification for an alien to be employed as a physical therapist (§656.5(a)(1)) must file as part of its labor certification application a letter or statement, signed by an authorized state physical therapy licensing official in the state of intended employment, stating the alien is qualified to take that state's written licensing examination for physical therapists. Application for certification of permanent employment as a physical therapist may be made only under this § 656.15 and not under § 656.17

The sole issue on appeal in this matter is whether the petitioner filed the I-140 within the validity period of the state prevailing wage determination issued by the State Workforce Agency (SWA) applicable to the certified position in compliance with the applicable regulations found at 20 C.F.R. Part 656.

The regulation at 20 C.F.R. § 656.15 states in pertinent part:

(a) *Filing application.* An employer must apply for a labor certification for a *Schedule A* occupation by filing an application in duplicate with the appropriate DHS office, and not with an ETA application processing center.

(b) *General documentation requirements.* A *Schedule A* application must include:

- (1) An *Application for Permanent Employment Certification* form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.
- (2) Evidence that notice of filing the *Application for Permanent Employment Certification* was provided to the bargaining representative or the employer's employees as proscribed in § 656.10(d).

The regulation at 20 C.F.R. §656.40(c) provides that the SWA must specify the validity period of the prevailing wage, which may not be less than 90 days or more than 1 year from the determination date. To use the SWA prevailing wage determination, the employers must file their applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.

With the initial filing of the I-140, the petitioner failed to submit any application for Schedule A certification. In response to the director's request for evidence issued on March 24, 2006, the petitioner provided a partially completed Form 9089 indicating that the prevailing wage for the certified position is \$59,384. The petitioner's wage offer of \$60,000 per year is set forth on Part G of the Form 9089. The SWA prevailing wage determination submitted in response to the director's request for additional evidence indicates that it wasn't requested until well after the I-140 was filed. The validity period on the prevailing wage determination is specified as from April 13, 2006 to December 31, 2006.

The director denied the petition on August 30, 2006, concluding that since the filing date of the I-140 did not fall with the date range of the validity period of the SWA prevailing wage determination, the petition may not be approved.

On appeal, counsel fails to directly address the director's grounds for denial. Instead, he attempts to explain the notice of postings of the job opportunity that had described the proffered salary as both \$50,000 per year and later as \$60,000 per year. Counsel merely emphasizes that the petitioner had complied with the pertinent DOL regulations. With the appeal counsel submits a second Form 9089 and a second prevailing wage determination issued by the New York State DOL that indicates that it was issued on September 19, 2006 with a validity period running from "9/16/2006" to "12/31/2005." We presume that the 2005 year designation is a typographical error. The prevailing wage is stated as \$27.51 per hour.

The submission of an additional Form 9089 and SWA prevailing wage determination does not overcome the director's basis for denying the I-140. As noted above, the date of filing the I-140 designates the priority date of the petition. In this case the priority date is September 30, 2005 as indicated by the receipt stamp on the I-140. Pursuant to 20 C.F.R. § 656.15, CIS, not the DOL, reviews the Schedule A applications that are required to accompany the I-140. The validity period of the supporting SWA prevailing wage determination must be reflective of the wages being offered for comparable positions at the time that the I-140 is filed or else the I-140 may not be approved and the corresponding priority date may not be retained. In this case, the AAO concurs with the director's decision to deny the I-140 because the application was not filed within the validity period of the prevailing wage determination. It is noted that submitting amended documents such as a new prevailing wage determination does not cure the original omission. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Beyond the decision of the director, it is noted that neither of the two job postings signed by the employer supplied in response to the director's request for evidence reflected the petitioner's correct proffered rate of pay of \$60,000 per year, in accordance with 20 C.F.R. § 656.10(d)(6) or provided the correct address of appropriate DOL certifying officer. Submitting an additional notice of posting with the same dates but with the corrected rate of pay of \$60,000 per year on appeal will not be considered as credible. See *Matter of Izummi*, *supra*. Since the petitioner failed to post the notice in compliance with regulations prior to the filing, the petition is not approvable. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

It is also noted that the financial documentation offered in support of the petitioner's ability to pay the proffered wage of \$60,000 per year does not appear to adequately demonstrate the ability to pay as of the priority date. The petitioner's 2005 federal tax return indicates that neither the petitioner's net income of \$36,250 nor its net current assets of \$24,301<sup>2</sup> as indicated on Schedule L of the tax return was sufficient to

---

<sup>2</sup> Besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure

cover the shortfall of \$39,693, resulting from a comparison of the beneficiary's actual 2005 wages of \$20,307.66 paid by the petitioner to the proffered wage of \$60,000 per year. The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to demonstrate its continuing financial ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The evidence required must include federal tax returns, annual reports, or audited financial statements to establish a petitioner's ability to pay.<sup>3</sup> From the evidence submitted in the instant case, it may not be concluded that this requirement was satisfied.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

---

of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s)16 through 18 of Schedule L of its federal tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

<sup>3</sup> It is also noted that the beneficiary's biographic information form (G-325A), signed by the beneficiary on September 22, 2005, indicates that he has worked for the petitioner from March 2003 to the present time, yet an experience certificate submitted from an Egyptian employer, dated May 1, 2005, indicates that the beneficiary worked at that facility from August 1, 1996 to the present date. No explanation for this inconsistency was offered.