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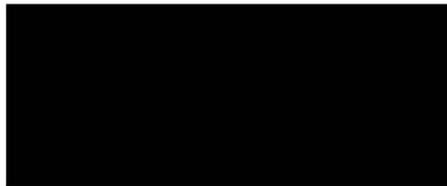
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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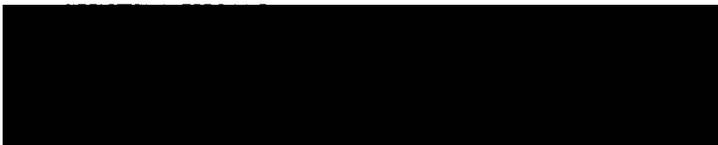
Date: JUN 02 2008

IN RE: Petitioner:
Beneficiary:



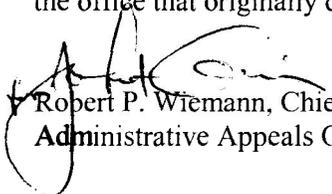
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner rehabilitation services 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 establish that the beneficiary possessed the necessary qualifications and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and maintains that the petitioner had established the beneficiary's qualifications and that the petition should be approved.¹

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)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 March 28, 2006.

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 (DOL) 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 March 28, 2006.

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 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.

(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 primary issue in this case is whether the petitioner provided the appropriate letter or statement signed by an authorized state physical therapy licensing official affirming that the beneficiary was qualified to take that state's written licensing examination for physical therapists.

In response to the director's request for evidence issued on September 7, 2006, requesting this letter or statement from the petitioner, the petitioner provided an unsigned letter, dated July 19, 2006, from the State of Michigan addressed to the beneficiary stating that he was eligible to take the National Physical Therapy Examination (NPTE). The beneficiary was directed to register to take the test by applying online. Once registered to take the test, the letter informed the beneficiary that an "Authorization to Test" would be sent to him with information related to scheduling his exam.

The director denied the petition based on his conclusion that the letter did not represent sufficient evidence to show that the beneficiary was authorized to take the test as of the date the petition was filed on March 28, 2006.

On appeal, counsel merely provides copies of documents related to the beneficiary's education, a two page signed copy of a Michigan certification of physical therapist educational requirements dated April 17, 2006, and an unsigned, undated copy of a Michigan authorization to test directing the beneficiary to take his test during an eligibility period from July 21, 2006 to September 19, 2006.

The AAO concurs with the director's decision to deny the petition based on the lack of the beneficiary's eligibility as of the priority date of March 28, 2006, confirmed by a signed letter or statement from a physical therapy licensing official in the state of intended employment, stating that alien is qualified to take the state's written licensing examination for employment as a physical therapist as required by the regulation at 20 C.F.R. § 656.15(c) (1). The regulation specifically requires this signed letter or statement. The letter dated July 19, 2006, submitted to the underlying record, would have been sufficient if it had been signed and issued at or before March 28, 2006. None of the documents submitted on appeal satisfy the regulation's specific requirement that the beneficiary is advised by a signed letter or statement that he is qualified to take the state's written licensing examination. 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). The petition is not eligible for approval on this basis.

Beyond the decision of the director, it is noted that the job posting submitted to the record signed by the petitioner's administrator does not comply with the regulatory requirements at 20 C.F.R. § 656.10(d). The regulation states in pertinent part:

(1) In applications filed under Section 656.15 (Schedule A), 656.16 (Shepherders), 656.17 (Basic Process), 656.18 (College and University Teachers), and 656.21 (Supervised Recruitment), 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 shall 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.

In this case, the notice of the posting did not provide the address of the appropriate certifying officer of the Department of Labor. According to the DOL's Frequently Asked Questions (FAQs) found online at <http://www.foreignlaborcert.doleta.gov/faqs.cfm>, the address of the DOL certifying officer for Michigan is located at:

Employment and Training Administration
Chicago Processing Center
Railroad Retirement Board Building
844 N. Rush Street, 12th Floor
Chicago, Illinois 60611

Since the petitioner failed to post the notice in compliance with regulations at 20 C.F.R. § 656.10(d) (3) (iii), the petition is not approvable on this basis.²

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.

² It is also noted that the petitioner's letterhead of an attached letter related to the notice of the job posting suggests that the petitioner may also be a third party services provider. It is unclear if that is the case in this matter, but in such a circumstance, the notice of job opportunity must be posted at the work site where the work will actually be performed.