U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 8 2004
WAC-02-023-56734

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. An appeal to the Administrative Appeals Office (AAO) was dismissed. The petition is again before the AAO on a motion to reopen or reconsider. The motion will be granted. The prior decision of the AAO will be affirmed and the petition will remain denied.

The petitioner is a physical therapy services firm. It seeks to employ the beneficiary permanently in the United States as a physical therapist. The petitioner asserts that the beneficiary qualifies for 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 failed to establish that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition and continuing to the present, and had failed to establish that the beneficiary was qualified to take the state licensing examination for physical therapists or that she held a license to practice physical therapy in the state of intended employment.

On appeal the petitioner submitted new evidence, including a copy of the Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and her husband for 2001, which had not been submitted previously. The AAO determined that the evidence established the ability of the petitioner to pay the proffered wage as of the filing date and continuing until the beneficiary obtains lawful permanent residence. However, concerning the beneficiary's qualifications the AAO determined that the evidence did not establish that the beneficiary qualified for classification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I, at the time the petition was filed. The AAO determined that since the petitioner had not complied with the Department of Labor regulations as of the time of filing the petition could not be approved.

With the motion to reopen or reconsider counsel submits a copy of a letter dated March 19, 2003 from the Physical Therapy Board of California to the beneficiary notifying her that she passed the California Laws Examination on February 10, 2003.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Eligibility in this matter turns, in part, on the qualifications of the beneficiary for the position at the priority date. Employment-based petitions depend on priority dates. The priority date for Schedule A occupations is established when the I-140 is properly filed with Citizenship and Immigration Services (CIS) (formerly the Service or the INS). 8 C.F.R § 204.5(d). The petition must be accompanied by the documents required by the particular section of the regulations under which it is submitted. 8 C.F.R. § 103.2(b)(1). The priority date of the petition in this case is October 15, 2001.

The evidence in the record before the AAO relevant to the beneficiary's qualifications consisted of the following documents: a copy of the beneficiary's diploma from the Fatima College of Physical therapy, Valenzuela, Metro Manila, Philippines, showing the award of a Bachelor of Science in Physical Therapy on October 15, 1996; certificates dated in 1997 and 1999 relating to the beneficiary's licensing and training as a physical therapist in the Philippines; the beneficiary's record of her score on the Test of English as a Foreign Language (TOEFL) examination taken October 1997; a certification dated February 7, 2000 from a former

employer of the beneficiary in the Philippines stating the beneficiary's employment as a physical therapist from August 1997 to January 2000; a letter dated March 13, 2002 from the beneficiary to the Physical Therapy Board of California; an undated letter from the Physical Therapy Board of California to the beneficiary in response to her letter of March 13, 2002; a form from the International Education Research Foundation, Inc. acknowledging receipt of an application for credentials evaluation on March 25, 2002; a copy of a fee schedule from the Physical Therapy Board of California dated April 13, 2002, with attached documents pertaining to the beneficiary; and a letter dated July 25, 2002 from the Physical Therapy Board of California to the beneficiary.

The regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part as follows: "*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

With the instant motion counsel submits a letter dated March 19, 2003 from the Physical Therapy Board of California to the beneficiary notifying her that she passed the California Laws Examination on February 10, 2003. That letter contains new facts within the meaning of the above regulation. The record before the AAO had closed approximately thirty days after the filing of the petitioner's I-290B Notice of Appeal on July 19, 2002, with counsel's submission on August 21, 2002 of additional evidence on appeal. Since the evidence submitted with the motion pertains to facts occurring after that date, the motion will be granted as a motion to reopen, and the newly-submitted evidence will be considered, as well as the previously-submitted evidence.

The regulation at 8 C.F.R. § 656.10 states in pertinent part as follows:

> The Director, United States Employment Service (Director), has determined that there are not sufficient United States workers who are able, willing, qualified, and available for the occupations listed below on Schedule A and that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. An alien seeking a labor certification for an occupation listed on Schedule A may apply for that labor certification pursuant to Sec. 656.22.

(8 C.F.R. § 656.10, continued)

> Schedule A
>
> (a) Group I:
>
> (1) Persons who will be employed as physical therapists, and who possess all the qualifications necessary to take the physical therapist licensing examination in the state in which they propose to practice physical therapy.

The regulation at 20 C.F.R. § 656.22(c) states in pertinent part as follows:

> An employer seeking labor certification under Group I of Schedule A shall file, 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 (Sec. 656.10(a)(1) of this part) shall 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 that 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 pursuant to this Sec. 656.22 and not pursuant to Secs. 656.21, 656.21a, or 656.23 of this part.

The evidence before the AAO on appeal included a letter dated March 13, 2002 from the beneficiary to the Physical Therapy Board of California in which the beneficiary requested a letter or statement from the Board that she was qualified to take the California licensing examination. The record also included an undated letter from a [redacted] on behalf of the Physical Therapy Board of California (PTBC) in reply to the beneficiary's March 13, 2002 letter. In the reply letter [redacted] informed the beneficiary that the PTBC could not authorize her to sit for the examinations until her credentials had been evaluated by an approved credential evaluating agency and her credentials had been approved by the PTBC. The record before the AAO also contained a form from the International Education Research Foundation, Inc. acknowledging receipt of an application for credentials evaluation on March 25, 2002. The form does not identify the individual for whom the application had been made, but for the purposes of this analysis it is assumed that the application was made for an evaluation of the credentials of the beneficiary.

The foregoing three documents indicate that the beneficiary lacked an evaluation of her credentials as of March 25, 2002 and that for that reason she was not then eligible to take the California state licensing examination.

The evidence before the AAO also included a letter dated July 25, 2002 from the Physical Therapy Board of California to the beneficiary informing the beneficiary that her educational credentials had been approved and that she had been "recommended to appear for the National Physical Therapy Examination (NPTE) and the California Laws Examination (CLE)." No other evidence in the record indicates any earlier date on which the beneficiary was eligible to take the California state licensing examination.

The priority date in the instant petition is October 15, 2001. A petitioner must establish the elements for the approval of the petition at the priority date. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

With the instant motion counsel submits a copy of letter dated March 19, 2003 from the Physical Therapy Board of California to the beneficiary notifying her that she passed the California Laws Examination on February 10, 2003. In his motion counsel concedes that the beneficiary was not qualified to take the Physical Therapy Board examination in California when the petitioner filed the I-140 petition. Counsel states that the petitioner nonetheless filed the I-140 petition at that time because applying for that examination is a long process, and the beneficiary expected to fall out of status before it could be completed. Counsel requests "favorable discretion" to approved the petition. (Motion, page 2). Counsel's request may not be granted. The AAO is bound by the regulations quoted above, and a beneficiary's impending loss of status is not grounds for the approval of a petition if the beneficiary was not qualified for the position as of the filing date. *See Matter of Katigbak*, 14 I&N Dec. at 49.

In summary, the evidence fails to establish that the beneficiary had the required qualifications for the offered position as of the priority date.

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 motion is granted. The prior decision of the AAO is affirmed and the petition remains denied.