U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

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File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 2 4 2007

WAC-05-155-54475

In re: Petitioner:
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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center ("director"), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office ("AAO") on appeal. The appeal will be dismissed.

The petitioner operates a physical therapy clinic, and seeks to employ the beneficiary permanently in the United States as a physical therapist, a professional or skilled worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1153(b)(3).

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(i) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1153(b)(3)(A)(i), provides that a third preference category professional is a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b). *See also* 8 C.F.R. § 204.5(l)(3)(ii). For the beneficiary to qualify, the petitioner must show that it has the ability to pay the beneficiary the proffered wage, and that the beneficiary meets the qualifications set forth in the certified labor certification. *See* 8 C.F.R. § 204.5(g)(2).

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the Department of Labor ("DOL") 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.

Based on 8 C.F.R. § 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file Form I-140, "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).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced 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 Application for Permanent Employment Certification to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d). Also, according to 20 C.F.R. § 656.15, a petitioner must file with the petition, a letter of statement signed by an authorized state physical therapy licensing official in the state of intended employment, which provides that the beneficiary is qualified to take the state's written licensing examination for physical therapists.

Additionally, the petitioner must demonstrate its ability to pay the proffered wage. The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability

shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner submitted the Application for Alien Employment Certification, Form ETA-750,[1] with the I-140 Immigrant Petition with the I-140 Immigrant Petition on May 11, 2005, which is the priority date. The proffered wage as stated on Form ETA 9089 for the position is $58,240 to $62,400.[2] On the I-140 petition filed, the petitioner listed the following information: established: October 20, 1983; gross annual income: $1,050,478; net annual income: $37,890; and current number of employees: 6.

On September 30, 2005, the director issued a Request for Evidence ("RFE") for the petitioner to submit: Form ETA 9089 in duplicate; a prevailing wage determination from the State Workforce Agency having jurisdiction over the proposed area of employment; a posting notice in compliance with 20 CFR § 656.10(d)(1); evidence of posting within in-house media; and for the petitioner to provide all relevant schedules for its federal tax returns submitted for 2004 to the present. The petitioner responded.

On April 6, 2006, the director denied the petition on the basis that the petitioner failed to obtain a SWA wage determination prior to filing in accordance with 20 CFR § 656.40. Accordingly, the petition did not qualify for Schedule A certification, and was denied. The petitioner appealed and the matter is now before the AAO.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

The record shows that the appeal is properly filed, timely and makes an allegation of error in law or fact. 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.

A petitioner must establish eligibility at the time of filing. *See 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

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[1] The petitioner initially and improperly submitted Form ETA 750, which had been replaced with the Application for Permanent Employment Certification, ETA 9089, effective March 28, 2005. On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the petition failed to meet Schedule A eligibility at the time of filing based on this aspect as well as the posting notice. *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. 1988). Further, the petitioner failed to initially submit a fully executed Form ETA 9089 in duplicate. The petitioner did provide a duplicate copy of the ETA 9089 in response to the RFE.

[2] The relevant State Workforce Agency determined that the prevailing wage was $23.16 per hour, which is equivalent to $48,172.80 per year.

[3] 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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

petition conform to Citizenship and Immigration Services ("CIS") requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

One of the requirements to meet Schedule A eligibility is that the petitioner must obtain a prevailing wage determination from the relevant State Workforce Agency ("SWA") in compliance with 20 CFR § 656.40 prior to filing. 20 CFR § 656.40 provides:

> (a) Application process. The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and returns the form with its endorsement to the employer.
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> . . .
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> (c) Validity period. The SWA must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date.

The petitioner only submitted the prevailing wage request in the response to the RFE, and not with the initial filing. The petitioner's wage request shows that it was submitted to the Employment Development Department ("EDD"), State of California, the relevant SWA, on November 22, 2005.[4] The EDD made a determination on the wage request on December 13, 2005 and assessed a wage rate of $23.16 per hour. As the wage request was only submitted to the SWA after the petition was filed, the director found that the petition fails to comply with 20 CFR § 656.40.

On appeal, counsel provides that the petitioner complied with applicable filing instructions, which were available at the time of filing the petition. Further, he provides that CIS published guidelines related to prevailing wage issues in September 2005 and February 2006, which were not available at the time of filing the instant petition, and were, therefore, applied retroactively. CIS issued guidance for Schedule A blanket labor certifications and listed an effective date of February 14, 2006. Guidance issued lists that the petitioner should submit the prevailing wage determination with the I-140 petition.

Revised DOL regulations related to Schedule A filings, however, were published and available in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). 20 C.F.R. § 656.40 specifically sets forth that the petitioner must request a wage and the wage obtained is assigned a validity period. In order to use a prevailing wage determination ("PWD"), "employers must file their [Schedule A] applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA." *See* 20 C.F.R. § 656.40(c).

In the case at hand, the petitioner obtained the PWD on December 13, 2005. The determination listed a 90 day validity period, which would have been from December 13, 2005 to March 13, 2006, after the petitioner's recruitment filing of the Schedule A application and the establishment of the May 11, 2005 priority date. Accordingly, the petition filed was defective and did not meet the requirements of a valid Schedule A filing.

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[4] A petitioner must establish the elements for the approval of the petition at the time of filing. *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. 1988).

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. On appeal, the petitioner has failed to overcome the director's decision.

ORDER: The appeal is dismissed.