

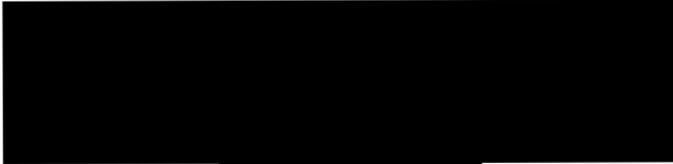


U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
EAC 05 144 50004

Office: VERMONT SERVICE CENTER

Date: JUL 19 2007

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, 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 professional corporation. 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. The director determined that the evidence submitted does not demonstrate that the notice of filing the Application for Permanent Employment Certification was made according to the regulation at 20 C.F.R. § 656.10(d). Additionally, the director found that the petition as filed contained no documentary evidence that the beneficiary's occupation is within the Labor Market Information Pilot Program. Accordingly, for the reasons stated above, the director denied the petition.

According to the petitioner, it was established in 2003, and, as of the date of the petition, it employed one individual.

On appeal, counsel submits an explanatory letter and additional evidence.

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 granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petition Form I-140 for classification of the beneficiary as a physical therapist was reviewed by the director under section 203(b)(2)¹ of the Act. It was accepted for filing on April 19, 2005. A receipt date is assigned upon the proper filing of the petition with the required filing fee. *See* 8 C.F.R. §§ 103.2(a)(1)(d), and, 103.2(a)(7)(i). It was accompanied by an uncertified Form ETA 750 prepared by the petitioner and the beneficiary.

The regulation at 8 CFR § 204.5(d) states in pertinent part:

Priority date ... The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation within the Department of Labor's Labor Market Information Pilot Program 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)

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.²

¹ The petitioner selected section 203(b)(2) of the Act relating to member of professions with advance degrees or exceptional ability on the petition but the director reviewed the petition under section 203(b)(3)(A)(ii) of the Act as the labor certification did not require an advanced degree and there is no statement in the record of proceeding of evidence of the beneficiary's exceptional ability in the profession of physical therapy or a request to review the petition that way.

² 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).

As a preface to the following discussion, new U.S. Department of Labor (DOL) regulations concerning labor certifications went into effect on March 28, 2005. The new regulations of the Permanent Labor Certification Program are referred to by DOL by the abbreviation "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. 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. After March 28, 2005, the DOL Form ETA 750 was replaced by the ETA Form 9089, Application for Permanent Employment Certification. As the I-140 was filed on April 19, 2005, PERM regulations apply to this case.

Aliens who will be permanently employed as physical therapists are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.5 for which the Director of the United States Employment Service has determined there are not sufficient United States workers who are able, willing, qualified, and available for the occupations and 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 employer seeking a labor certification for an occupation listed on Schedule A may apply for that labor certification under the regulation at 20 C.F.R. §656.5, as follows:

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.

* * *

(3) Definitions of Group I occupations:

(i) Physical therapist means a person who applies the art and science of physical therapy to the treatment of patients with disabilities, disorders and injuries to relieve pain, develop or restore function, and maintain performance, using physical means, such as exercise, massage, heat, water, light, and electricity, as prescribed by a physician (or a surgeon).

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Permanent Employment Certification (Form ETA-9089 at Part A) in duplicate with the appropriate Citizenship and Immigration Services (CIS) office.

The regulation at 20 C.F.R. § 656.10 entitled "General Instructions" state in pertinent part:

(a) Filing of applications. A request for a labor certification on behalf of any alien who is required by the Act to be a beneficiary of a labor certification in order to obtain permanent resident status in the United States may be filed as follows:

* * *

(3) An employer seeking labor certification for an occupation listed on Schedule A must apply for a labor certification under this section and Sec. 656.15.

Pursuant to 20 C.F.R. § 656.15 applications for labor certification for Schedule A Occupations require the following:

(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 ["PWD"] in accordance with Sec. 656.40 and Sec. 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 prescribed in Sec. 656.10(d).

(c) 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 (Sec. 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 Sec. 656.15 and not under Sec. 656.17.

On December 1, 2005, the director issued a request for evidence to the petitioner. In the request, the director informed the petitioner that on and after March 28, 2005, filings for Schedule A, Group I petitions require according to the regulations at 20 C.F.R. § 656, *et seq.* a prevailing wage determination (PWD) issued by the State Workforce Agency (SWA). The director informed the petitioner that the validity period mentioned must fall between 90 days and one year of the date of the determination, and, that the offered wage must equal the prevailing wage, and not less. The director also informed the petitioner that the location of the notice of posting for notification purposes must be where the alien will be actually physically employed.

By letter dated February 3, 2006, counsel submitted in response to the director's request a "Notice of Job Opportunity" dated January 22, 2006 for a posting period March 18, 2005 to April 7, 2005; and, a notice of

“Job Opportunity” dated January 27, 2006, for a posting period December 12, 2005 to December 29, 2005. According to the validity period established by the acceptance of the petition which is April 19, 2005, the posting should have occurred before March 21, 2005.

On January 12, 2006, the director issued a second request for evidence to the petitioner. In the request, the director informed the petitioner that on and after March 28, 2005, filings for Schedule A, Group I petitions require according to the regulations at 20 C.F.R. § 656, *et seq.* that the petitioner to submit a Form I-140 with filing fee; an uncertified Form ETA 9089, in duplicate and properly signed; a PWD issued by the State Workforce Agency (SWA); a copy of the posting notice; and, copies of all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions to the position specified in the Form ETA 9089 within the employer’s organization.³

Additionally, the director informed the petitioner that for petitions involving physical therapists, the petition must contain a permanent license to practice in the State of intended employment, or 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.

With reference to the prevailing wage determination submitted with the initial filing the director stated that it did not meet current CIS requirements. According to the director, the PWD must specify on its face the date of determination of the wage by the SWA and the validity period for that wage. The director informed that the validity period mention must fall between 90 days and one year of the date of the determination, and, that the offered wage must equal the prevailing wage, and not less.⁴

³ According to the regulation at 20 C.F.R. § 656.10(d)(1)(ii) the regulation requires in pertinent part, “ ... 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 ...”

⁴ The regulation at 20 C.F.R. § 656.15 (b)(1) states in pertinent part:

* * *

A. Schedule A application must include:

(1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with Sec. 656.40 and Sec. 656.41.

* * *

The regulation at 20 C.F.R. § 656.40 entitled “Determination of prevailing wage for labor certification purposes” states in pertinent part:

(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 return the form with its endorsement to the employer. Unless the employer chooses to appeal the SWA's prevailing wage determination under Sec. 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with an ETA application processing center and maintains the SWA PWD in its files. The determination shall be submitted to an ETA application processing center in the event it is requested in the course of an audit.

The director specifically requested that the petitioner submit evidence that the notice of filing the Application for Permanent Employment Certification was made according to the regulation at 20 C.F.R. § 656.10(d) for 10 consecutive business days, and also that notice of filing was provided between 30 and 180 days before filing the application according to the regulation at 20 C.F.R. § 656.10(d)(3)(iv). The director informed the petitioner that the location of notification purposes must be where the alien will be actually physically employed.

Prior to the due date of this second request for evidence, the director denied the petition on March 6, 2006. Counsel appealed the director's decision on April 7, 2006, and asserts, *inter alia*, that:

I-140 & I-485 petition was denied wrongly. A Notice / Request for Evidence was received for the above instant I-140 Petition and on January 12, 206 [sic] with a deadline date in which to submit the requested document of April 9, 2006. However the I-140/I-485 Petition was denied on March 6, 2006 before the actual deadline date of April 9, 2006.

Counsel asserts on appeal and in a letter dated April 6, 2006, that the petition was wrongfully denied as petitioner had until April 9, 2006, to respond to the request according to the terms of the request for evidence.

On appeal, the petitioner provided the following additional evidence: two explanatory letters from counsel dated March 3 and 23, 2006; the request for evidence dated January 12, 2006; a New York State Department of Labor prevailing wage determination dated January 20, 2006; a "Job Vacancy" notice dated February 28, 2005 for a posting period stated as February 9, 2005 to February 28, 2005; a "Job Opportunity" notice dated January 27, 2006 for a posting period stated as December 12, 2005 to December 29, 2005; a "Notice of Job Opportunity" dated January 2, 2006 for a posting period March 18, 2005 to April 7, 2005; a "Job Vacancy" notice dated December 12, 2004; a "Job Vacancy" notice dated November 29, 2004; a letter dated February 10, 2005, from the New York State Education Department stating that the beneficiary's education has been approved and that the beneficiary's application had been forwarded to the Physical Therapy Licensing Unit; a notice dated March 6, 2006, from the Federation of State Boards of Physical Therapy entitled "Authorization to Test;" a statement dated March 22, 2006 stating that the beneficiary is scheduled to take the physical therapy profession examination on March 29, 2006; a ETA Form 9089 in duplicate completed by the employer on March 13, 2006, by the beneficiary on March 22, 2006, and, by counsel (undated); and, a notice that "RA" with a certain social security number and transaction number passed the exam for physical therapist for New York dated April 5, 2006.

By letter dated March 25, 2006, counsel submitted a certificate dated April 12, 2006 and a registration certificate valid through March 31, 2009, stating that the beneficiary is a licensed physical therapist in the State of New York as well as other documents.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. There is no regulatory requirement for CIS to issue a request for evidence. The regulation at 8 C.F.R. § 103.2(b)(8) provides that an application or petition may be denied if there is clear evidence of ineligibility, notwithstanding the lack of initial evidence. Clear ineligibility exists when an applicant or petitioner does not meet a basic statutory or regulatory requirement.

The director determined that the evidence submitted does not demonstrate that the notice of filing the Application for Permanent Employment Certification was made according to the regulation at 20 C.F.R. § 656.10(d).

Additionally, the director found that the petition as filed contained no documentary evidence that the beneficiary's occupation is within the Labor Market Information Pilot Program.

In the present case the evidence in this matter demonstrates that the petition was accepted for filing on April 19, 2005, but that it did not include an uncertified Form ETA 9089, in duplicate and properly signed; an acceptable⁵ PWD issued by the State Workforce Agency; a copy of the posting notice and copies of all in-house media, whether electronic or printed in accordance with the normal procedures used for the recruitment of similar positions to the position specified in the Form ETA 9089 within the employer's organization, among other deficiencies.

Further, we note that counsel is not asserting that the petitioner could have retroactively corrected the deficiencies found by the director. In the initial filing, counsel only submitted the I-140 petition with an uncertified ETA Form 750 A/B, a filing receipt for the petitioner's incorporation; and, other corporation documents and tax returns. We find that the evidence submitted does not demonstrate that the notice of filing the Application for Permanent Employment Certification was made according to the regulation at 20 C.F.R. § 656.10(d).⁶

Additionally, we find that the petition as filed contained no documentary evidence that the beneficiary's occupation is within the Labor Market Information Pilot Program. No prevailing wage determination issued by the State Workforce Agency was initially submitted by the petitioner. Since the notice of posting should have occurred before March 21, 2005 based upon the filing date of the I-140 on April 19, 2005, we find that the director did not err by rendering a decision prior to the return date of the second request for evidence mentioned above. As already stated the petitioner could not have retroactively corrected the deficiencies found by the director. Therefore, if anything, the director erred by requesting additional evidence on December 1, 2005, and again, January 12, 2006, when in fact the deficiencies mentioned above could not be cured retroactively. The director committed harmless error in this matter that in no way prejudiced the petitioner.

In summary, we find that the petitioner submitted no evidence that the Application for Permanent Employment Certification was posted in its in-house media;⁷ that the PWD submitted was not issued in a timely fashion, but after the validity date established by the acceptance of the petition which is April 9, 2005 (the PWD was issued by the SWA on January 20, 2006);⁸ that there is no evidence was submitted if there is a bargaining agent at the place of employment; that no evidence was submitted of notice given to a bargaining agent; that no evidence was submitted where the notice was posted; that the beneficiary's professional license was not issued until April 12, 2006; and, that no letter was submitted establishing that the beneficiary was qualified to take the states' written licensing examination.⁹

⁵ In the request for evidence, the director specifically informed the petitioner that the PWD must specify on its face the date of determination of the wage by the SWA and the validity period for that wage. The director informed the petitioner that the validity period mentioned must fall between 90 days and one year of the date of the determination, and, that the offered wage must equal the prevailing wage, and not less.

⁶ As already stated, by letter dated February 3, 2006, counsel submitted in response to the director's request a "Notice of Job Opportunity" dated January 22, 2006 for a posting period March 18, 2005 to April 7, 2005; and, a notice of "Job Opportunity" dated January 27, 2006 for a posting period December 12, 2005 to December 29, 2005. According to the validity period established by the acceptance of the petition which is April 19, 2005, the notice of posting should have occurred before March 21, 2005.

⁷ See 20 C.F.R. § 656.10(d)(1)(ii).

⁸ See 20 C.F.R. § 656.40.

⁹ If this matter is pursued, we also note that the petitioner has not established its ability to pay the proffered

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 appeal is dismissed.

wage. Proof should be submitted.