



U.S. Citizenship
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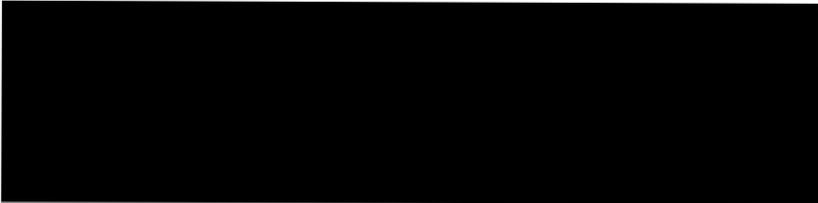
Office: NEBRASKA SERVICE CENTER

Date: JUL 25 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

cc: JOEL S PAUL
6214 MORENCI TR STE 290
INDIANAPOLIS IN 46268

DISCUSSION: The Acting Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a staffing service. It seeks to employ the beneficiary permanently in the United States as a physical therapist. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification accompanied the petition. The acting director determined that the visa petition was not supported by a valid prevailing wage determination as required by 20 C.F.R. § 656.40(a) and (c) and denied the petition accordingly.

The record shows that the appeal was timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the acting director's decision of denial the sole issue in this case is whether or not the filing conformed to the requirements of 20 C.F.R. § 656.40.

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 granting 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 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.

The regulation at 20 C.F.R. § 656.40(a) states, in pertinent part,

Application process. The employer must request a prevailing wage determination [PWD] from the SWA [State Workforce Agency] having jurisdiction over the proposed area of the intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer.

The regulation at 20 C.F.R. § 656.40(c) states,

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. To use a SWA PWD, employers must file their applications or begin recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The Form I-140 visa petition in this matter was submitted on July 26, 2005. No SWA PWD accompanied that petition. In a request for evidence issued on September 6, 2005 the acting director requested that the petitioner submit a PWD. The acting director noted that the PWD must demonstrate that it was valid on the date the petitioner filed the petition in this matter.

In response, the petitioner submitted a PWD issued by the Michigan Bureau of Workforce Programs. That PWD shows that it was issued on September 30, 2005 and that it was valid for use for 90 days beyond that date.

The acting director denied the petition on December 3, 2005, noting that it was not filed during the period when the PWD was valid. On appeal, counsel asserted that the wages paid to the petitioner's employees exceed the proffered wage, and comply, therefore, with the substance of the law.

The petitioner failed to submit the visa petition in this matter during the validity period of that PWD as required by 20 C.F.R. § 656.40. The petition may not, therefore, be approved. The petition was correctly denied on this basis, which has not been overcome on appeal.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.