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U.S. Citizenship
and Immigration
Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date:

DEC 22 2006

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hospital. 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 comply with the Department of Labor (DOL)'s prevailing wage determination requirements and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific 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.

As set forth in the director's November 1, 2006 denial, the main issue in this case is whether or not the petitioner submitted a prevailing wage determination with the petition from the state workforce agency (SWA) with jurisdiction over the area of intended employment.

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 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 are members of the professions.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed 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 [United States Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d). Here, the priority date is October 19, 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 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.

The regulation at 20 C.F.R. § 656.15 states in pertinent part:

(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 in accordance with § 656.40 and § 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 proscribed in § 656.10(d).

The regulation at 20 C.F.R. § 656.15(b) requires an *Application for Permanent Employment Certification* form for *Schedule A* to include a prevailing wage determination in accordance with § 656.40 and § 656.41.

The regulation at 20 C.F.R. § 656.40(a) states:

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 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 the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.

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 appeal¹. The relevant evidence in the record includes an *Foreign Labor Certification (FLC)* wage

result from the U.S. Department of Labor Employment and Training Administration and a prevailing wage determination from the Indiana Department of Workforce Development.

In the instant case, the petitioner submitted an FLC Wage Result from the U.S. Department of Labor Employment & Training Administration and a prevailing wage determination obtained from the Indiana Department of Workforce Development with a determination date of October 27, 2006. The prevailing wage determination indicates that this prevailing wage is valid for filing applications and attestations for not less than 90 days or more than nine months. Therefore, the prevailing wage determination was valid from October 27, 2006 to July 27, 2007. On appeal, the petitioner submits a second prevailing wage determination obtained from the Indiana Department of Workforce Development with a determination date of November 8, 2006. The prevailing wage determination indicates that this prevailing wage is valid for filing applications and attestations for not less than 90 days or more than eight months. Therefore, the prevailing wage determination was valid from November 8, 2006 to July 8, 2007. As previously noted, the record shows that the instant petition was filed on October 19, 2006. The PERM regulations expressly state that a Schedule A application must be filed with a prevailing wage determination and an employer must file their applications within the validity period specified by the State Workforce Agency (SWA). In the instant case the petitioner as the employer did not file the petition within the validity period specified by Indiana Department of Workforce Development. Therefore, the petitioner failed to comply with the regulatory requirements with respect to the prevailing wage determination validity period at the priority date.

Counsel asserts that the FLC wage determination printed from DOL's website and provided with the initial filing offers the same information as the SWA wage determination. *Counsel's brief*. She further notes that although the petitioner did not provide information in compliance with 20 C.F.R. § 656.40, it did comply with the spirit of the law in that it submitted a prevailing wage endorsed by the Department of Labor, the prevailing wage was accurate at the time of the job offer, and that the petitioner has promised to pay a wage above the prevailing wage. *Id.* She also states that the petitioner's FLC prevailing wage is similar to a private prevailing wage survey. *Id.* While the AAO acknowledges counsel's assertions, it notes that the plain language of 20 C.F.R. § 656.40 states that the employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. There is nothing in the regulation that allows substitution of a FLC wage information printed from the United States Department of Labor's website for a SWA wage determination issued for a specific case. As such, the AAO finds counsel's assertions to be without merit. It notes that the Director correctly found that the FLC printout from the United States Department of Labor website does not constitute a prevailing wage determination made by the SWA.

¹ 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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Counsel further states that approval of the petitioner's application will have no adverse affect on the workforce. *Counsel's brief.* The AAO finds that counsel's statement is irrelevant in determining whether the petitioner complied with the regulation at 20 C.F.R. § 656.40(a).

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.