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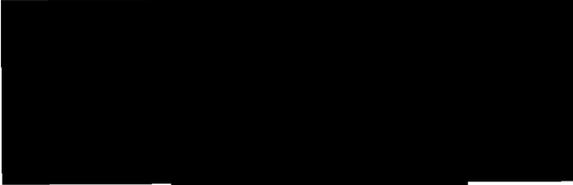
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 25 2010  
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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.

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center (director), certified the denial of the immigrant visa petition to the Administrative Appeals Office (AAO). The director's decision to deny the petition will be affirmed.

The petitioner is a staffing business. It seeks to permanently employ the beneficiary in the United States as a physical therapist. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>1</sup>

The petition contains a blanket labor certification application 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 U.S. 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 must file a Form I-140, Immigrant Petition for Alien Worker accompanied by an application for Schedule A designation. The priority date of the petition is the date the petition is properly filed with U.S. Citizenship and Immigration Services (USCIS). 8 C.F.R. § 204.5(d).

The Schedule A application must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer's completion of an ETA Form 9089, Application for Permanent Employment Certification and evidence that the employer has provided appropriate notice of filing the labor certification (Posting) to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d). The petitioner must also obtain a prevailing wage determination (PWD) in compliance with 20 C.F.R. § 656.40.

The instant petition was filed with USCIS on November 9, 2007. The ETA Form 9089 states that the prevailing wage is \$24.77 per hour and that the offered wage is \$26.92 per hour. The petition was accompanied by a PWD valid from June 15, 2007 until September 13, 2007. The prevailing wage listed on the PWD is \$24.77 per hour. The petitioner also submitted a position posting, which indicates that it was posted from May 7, 2007 to May 25, 2007. The posting states that rate of pay for the proffered position is \$56,000.00 per year (\$26.92 per hour).

On January 26, 2009, the director issued a request for evidence (RFE) instructing the petitioner to submit a PWD that was valid on the November 9, 2007 petition filing date. On March 2, 2009, the

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<sup>1</sup>Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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, 8 U.S.C. § 1153(b)(3)(A)(ii), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

petitioner submitted a second PWD, valid from December 13, 2007 until June 30, 2008. The second PWD contains a prevailing wage of \$25.50 per hour. On appeal, the petitioner submitted a third PWD, valid from July 2, 2007 until September 30, 2007. The third PWD contains a prevailing wage of \$48,318.00 per year (\$23.23 per hour). The AAO does note that the position posting did list a rate of pay higher than all three PWDs submitted. However, under 8 C.F.R. § 204.5(d), the priority date of the petition is the date the petition is properly filed with USCIS, which was on November 9, 2007. The AAO finds that none of the three PWDs submitted were valid when the petition was filed with USCIS. Accordingly, the petitioner has not obtained a PWD in compliance with 20 C.F.R. § 656.40.

In order for the petition to be approved, the petitioner must submit a PWD that complies with the requirements of 20 C.F.R. § 656.40. *See also* 20 C.F.R. § 656.15(b)(1). The regulation at 20 C.F.R. § 656.40(c) states that a Schedule A application must be filed within the validity period of the PWD. This is in contrast to the PERM labor certifications, which only requires the PWD to be valid during the recruitment period for the offered position. *Id.* However, since Schedule A occupations are designated by the DOL as shortage occupations, no recruitment is conducted as part of the Schedule A application process.

On appeal, counsel notes that the position posting listed a wage that was higher than the wages listed on the three PWDs. Counsel urges the AAO to consider the intent behind the Schedule A regulations and consider that the petitioner originally attempted to file the petition with USCIS on July 2, 2007, a period covered by two of the PWDs submitted. The AAO again notes that, under 8 C.F.R. § 204.5(d), the priority date of the petition is the date the petition is properly filed with USCIS. The priority date in this instance is November 9, 2007, not July 2, 2007.

For Schedule A applications, the PWD must be valid when the petition and accompanying ETA Form 9089 are filed with USCIS. In the instant case, the duration period for the three PWDs submitted had either expired or had not yet become available when the petition was filed.

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 petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

For the reasons set forth above, the petitioner failed to submit a PWD that would permit an approval of the instant petition and accompanying Schedule A application.

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.