

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY



B6

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:

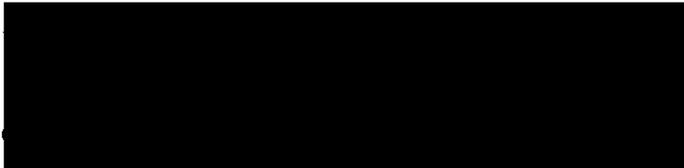


Beneficiary:

OCT 05 2010

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:

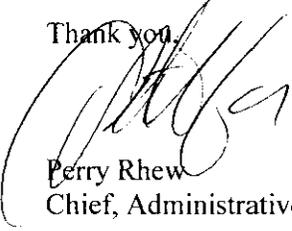


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 provides contract therapy management, 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).

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 the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(2), and section 203(b)(3)(A)(i) of 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii).

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."¹ 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 Form I-140 petition was filed on October 13, 2006.

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 Alien Employment Certification

¹ 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).

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(c)(1):

An employer seeking Schedule A labor certification for an alien to be employed as a physical therapist (§ 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 the state's written licensing examination for physical therapists. Application for certification of permanent employment as a physical therapist may be made only under § 656.15 and not under § 656.17.

On September 20, 1997, the director issued a Notice Of Intent To Deny (NOID) requesting the following: the Application for Permanent Employment Certification (ETA Form 9089); a letter or statement signed by an authorized physical therapy licensing official in the state of intended employment stating that the alien is qualified to take the state's licensing examination for physical therapists; notice of the filing of the Application for Permanent Employment Certification; and a prevailing wage determination. By correspondence dated October 19, 2007, the petitioner responded to the director's NOID and submitted the following: an application for Permanent Employment Certification (ETA Form 9089); a letter from the Physical Therapy Board of California stating that the beneficiary had passed the National Physical Therapist Examination (NPTE) on July 2, 2004; a copy of the beneficiary's [REDACTED] Physical Therapist license issued on April 20, 2005; a letter dated April 13, 2006 from the [REDACTED] [REDACTED] stating that the beneficiary was approved for a Visa Screen Certificate, along with a copy of the Visa Screen Certificate issued on April 13, 2006; and a copy of the beneficiary's Bachelor of Science degree in Physical Therapy issued in [REDACTED] on April 12, 2002. On or about October 30, 2007, the petitioner submitted a prevailing wage determination request bearing a determination date of October 25, 2007.

On January 31, 2008, the director denied the petition because the Prevailing Wage Determination (PWD) submitted by the petitioner was not valid as of the filing of the Form I-140 petition on October 13, 2006, and because the petitioner did not submit: an Application for Permanent Employment Certification; evidence of licensure of the alien beneficiary; and Notice of the filing of an Application for Permanent Employment Certification.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

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

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.

On appeal, counsel asserts that it has submitted all documentation requested by the director (a properly executed ETA Form 9089 signed by all required parties on October 19, 2007; a letter from the Physical Therapy Board of [REDACTED] dated July 9, 2004 stating the beneficiary had passed the National Physical Therapist Examination (NPTE);³ the notice of filing an Application for Permanent Employment Certification [submitted for the first time on appeal]; and a PWD and states that the petition should be approved.

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).

One of the requirements to meet Schedule A eligibility is that the petitioner is required to post the position in accordance with 20 C.F.R. § 656.10(d), which provides:

- (1) In applications filed under § 656.15 (Schedule A), § 656.16 (Shepherders), § 656.17 (Basic Process); § 656.18 (College and University Teachers), and § 656.21 (Supervised Recruitment), the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the certifying officer as follows:

...

- (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment . . . 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.

³ The record contains a copy of the beneficiary's [REDACTED] physical therapy license which was issued on [REDACTED] 5, prior to the filing of the Form I-140 petition on October 13, 2006. Therefore, the petitioner has established that the beneficiary had the required license by the priority date.

...

(3) The notice of the filing of an Application for Permanent Employment Certification shall:

- (i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
 - (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
 - (iii) Provide the address of the appropriate Certifying Officer; and
 - (iv) Be provided between 30 and 180 days before filing the application.
- ...

(6) If an application is filed under the Schedule A procedures at § 656.15. . . the notice must contain a description of the job and rate of pay and meet the requirements of this section.

Additionally, section 212 (a)(5)(A)(i) of the Act states the following:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified . . . that

- (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

Fundamental to these provisions is the need to ensure that there are no qualified U.S. workers available for the position prior to filing. The required posting notice seeks to allow any person with evidence related to the application to notify the appropriate DOL officer prior to petition filing. *See* the Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); *see also* Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).

To be eligible for a Schedule A petition, as set forth above the petitioner would need to have posted the position pursuant to 20 C.F.R. § 656.10(d)(3)(iv) 30 to 180 days prior to the October 13, 2006 filing, and have met the other requirements of 20 C.F.R. § 656.10(d).

In this instance the petition is deficient in the following respects:

- The PWD submitted by the petitioner was valid from October 25, 2007 until July 1, 2008, subsequent to the filing of the Form I-140 petition on October 13, 2006. The petitioner failed to obtain a prevailing wage determination (PWD) in compliance with 20 C.F.R. § 656.40 from the relevant State Workforce Agency (SWA) prior to filing. The regulation at 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). The petitioner must file ETA Form 9089 and Form I-140 with the prevailing wage determination issued by the SWA having jurisdiction over the proposed area of employment. See 20 C.F.R. § 656.15(b)(i). A petitioner must establish eligibility at the time of filing. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Here, the PWD was obtained a year after filing Form I-140 and fails to meet the foregoing regulatory requirements.
- The petitioner failed to submit an Application for Permanent Employment Certification with the filing of the Form I-140 as required by 20 C.F.R. § 656.15(b)(1). The application was subsequently submitted by the petitioner in response to the director’s Notice of Intent to Deny (NOID), and was executed by appropriate parties on October 19, 2007, subsequent to the filing of the Form I-140 on October 13, 2006. The submitted Application for Permanent Employment Certification will not, therefore, support the Form I-140 petition. The ETA Form 9089 is defective as it contains no prevailing wage information in part 8 and no wage offer in part 6. Additionally, the ETA Form 9089, part I, e.25 states “NA” [not applicable] to the question of whether the notice of filing has been posted for 10 consecutive business days. This fails to comply with the regulation at 20 C.F.R. § 656.10(d), which requires the petitioner to post a notice of filing for Schedule A petitions. A petitioner must establish eligibility at the time of filing. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).
- The petitioner failed to submit with the Form I-140 petition a notice of the filing of an Application for Permanent Employment Certification as required by 20 C.F.R. § 656.15(b)(2) and in compliance with 20 C.F.R. § 656.10(d). The petitioner submitted on appeal a copy of a notice of filing the Application for Permanent Employment Certification. The submitted notice, however, is deficient in the following respect:
 1. Counsel states that the notice was posted for more than a month. However, the notice states that it has been posted since October of 2007 with no start or end date in a conspicuous place for other employees to see. The statement lists [REDACTED] Human Resources Director, but is unsigned. The posting notice is deficient as it was

not provided between 30 and 180 days prior to filing the petition on October 13, 2006 as required by 20 C.F.R. § 656.10(d)(3)(iv). Additionally, it fails to list the proper certifying officer in accordance with 20 C.F.R. § 656.10(d)(3)(iii).

The petitioner failed to meet the posting requirements as set forth in 20 C.F.R. § 656.10(d), and failed to file the petition with a copy of a valid prevailing wage determination. Further, the petitioner failed to submit a complete, valid Application for Permanent Employment Certification with the filing of the Form I-140 as required by 20 C.F.R. § 656.15(b)(1).

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.