U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 05 002 51334 Office: CALIFORNIA SERVICE CENTER Date: DEC 29 2006

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 [redacted] a nursing registry. It seeks to employ the beneficiary permanently in the United States as a registered nurse. As required by statute, a completed Form ETA 750, Application for Alien Employment Certification accompanied the petition. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10(a), commonly referred to as Schedule A.

The director determined that the petitioner had not established that the beneficiary would be employed as a registered nurse or in another Schedule A position. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner proposes to employ the beneficiary exclusively as a registered nurse, which is a Schedule A position.

The record shows that the appeal was properly and 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.

Section 203(b)(3) of the Act states, in pertinent part:

> (A) In general. - Visas shall be made available . . . to the following classes of aliens . . . :
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> (i) Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.
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> (ii) Professionals. – Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 20 C.F.R. § 656.10(a)(2) states that professional nurses are among those qualified for Schedule A designation, if they have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or hold a full and unrestricted license to practice professional nursing in the state of intended employment.

The regulation at 20 C.F.R. § 656.22 [Applications for labor certification for Schedule A occupations.] (c)(2) states,

> An employer seeking a Schedule A labor certification as a professional nurse (§ 656.10(a)(2) of this part) shall file, as part of its labor certification application, documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination; or that the alien holds a full and unrestricted (permanent) license to practice

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[1] A tax return submitted shows that the petitioner in this matter is [redacted] Although that company name was misspelled [redacted] on both the Form ETA 750 and the Form I-140 visa petition this decision refers to the petitioner as [redacted] throughout.

nursing in the State of intended employment.

In a memo dated December 20, 2002, the Office of Adjudications of the INS, now CIS, issued a memo instructing Service Centers to accept a certified copy of a letter from the state of intended employment stating that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) and is eligible to receive a license to practice nursing in that state **in lieu** of either having passed the CGFNS examination or currently having a license to practice nursing in that state.

Because this petition was filed pursuant to Schedule A, eligibility in this matter hinges on the petitioner demonstrating that it intends to employ the beneficiary in a position that qualifies for Schedule A treatment.

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.[2]

In the instant case the record contains a copy of an employment contract dated April 23, 2004 between the beneficiary and [redacted] The petitioner, [redacted] is not a party to that employment contract, which provides that ECG will employ the beneficiary.

The issue raised by the director is whether the employment contract shows that the beneficiary will be employed exclusively in the proffered position, or whether it evinces an intent to employ the beneficiary in some other capacity.

The employment contract states, at paragraph four of the "Obligations of ECG" section, that ECG will support the beneficiary for three months while she obtains licensure. It also stipulates that if, during that period "...temporary licensure or other employment can be legally and properly arranged, [the beneficiary] agrees to engage in said employment in lieu of . . ." being supported by the petitioner. That paragraph indicates that the petitioner holds open the possibility, at least, of employing the beneficiary in some capacity other than the proffered position, at least temporarily.

Paragraph seven of that same section states that "ECG will pay the [beneficiary] at a rate of between $10 and $26 per hour depends [sic] on his/her position." The proffered position in this case is Registered Nurse. The wage the petitioner has agreed, on the Form ETA 750, to pay the beneficiary for performing in that position is $25 per hour. That the contract states that the wage the beneficiary might be paid ranges from $10 to $26 per hour indicates that it contemplates the possibility of employing her other than in the proffered position at less than the proffered wage.

Further, an addendum to the employment contract lists various positions in which the beneficiary might be employed. In addition to registered nurse they include, "CA Licensed LVN" at a wage of from $15 to $24 per hour, "CNA" at from $10 to $13 per hour, "IPRN," and "Clinical Clerk" at from $10 to $12 per hour. This,

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[2] 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).

again, indicates that the petitioner contemplates the possibility of employing the beneficiary other than in the proffered position at no less than the proffered wage

Paragraph nine of that section states, "If [the beneficiary] does not become licensed within six (6) months of arrival in the USA, this agreement maybe [sic] terminable at the request of ECG unless an alternative job assignment is provided such as clinical clerk & CAN." [sic] This indicates that, if the beneficiary is not ultimately employable as a registered nurse the petitioner contemplates attempting to identify some other position in which to employ her.

The director denied the petition on June 8, 2005. On appeal, counsel asserted that the position of CIS would require the petitioner to employ the beneficiary as a nurse before she is qualified pursuant to California law.

This office does not agree that the petitioner would be required to illegally employ the beneficiary under CIS' interpretation of the statutes and regulations. In any event, the petitioner is clearly not permitted to employ the beneficiary in any position other than that of registered nurse or at an amount less than the proffered wage pursuant to the visa petition sought in this case.

The instant visa category contemplates that the petitioner will employ the beneficiary in the proffered position. The petitioner's more flexible plan is not permitted pursuant to the instant visa category and the petition may not be approved. The petition was correctly denied on this ground and this basis has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial.

The petitioner in this matter is [redacted]. The petitioner submitted a contract for employment between the beneficiary and ECG. If [redacted] is not the intended employer, the entity that would employ the beneficiary and pay her the proffered wage, then [redacted] was not entitled to file the instant visa petition. In that event ECG, if it wished to employ the beneficiary, would be required to file its own petition for her.

Further, if ECG wished to file a petition for the beneficiary it would not necessarily be entitled to rely upon the Form ETA 750 labor certification in this matter, which was issued to [redacted] If a petitioner other than the entity to whom a labor certification was issued intends to rely on that certification it must demonstrate that it is a true successor[3] within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer.

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[3] In the alternative, ECG might demonstrate that, rather than being the successor of [redacted] they are the same entity. The petitioner's tax return, however, identifies it as [redacted] whereas the employment contract is between the beneficiary and [redacted] Those are apparently two separate entities.

The substituted petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-at-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. *See Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981).

Because the decision of denial did not discuss these issues and the petitioner has not been accorded the opportunity to address them, today's decision does not rely on those issues. If the petitioner attempts to overcome today's decision on motion, however, it should address those issues, in addition to the basis upon which this decision and the decision of denial were decided.

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.