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

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

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Date: APR 0 4 2012 Office: TEXAS SERVICE CENTER File: [redacted]

IN RE: Petitioner:
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:

[redacted]

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 $630. 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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a health enhancement facility. It seeks to employ the beneficiary permanently in the United States as a care manager, 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 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 United States 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).

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 to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d).

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[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).

Also, according to 20 C.F.R. § 656.5(a)(2), aliens who will be permanently employed as professional nurses must (1) have received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS), (2) hold a permanent, full and unrestricted license to practice professional nursing in the state of intended employment, or (3) have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing.

On September 12, 2008, the director denied the petition because the petitioner failed to submit a valid prevailing wage determination in accordance with 20 C.F.R. § 656.40. On appeal, additional issues have arisen including that the petitioner is no longer an active entity capable of sustaining a bona fide job offer, the petitioner failed to submit evidence that the beneficiary has the experience required by the terms of the petition, and the petitioner failed to submit evidence of its ability to pay the proffered wage from the priority date onwards.

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]

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.

Concerning the prevailing wage determination, 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 (PWD) in accordance with § 656.40 and § 656.41.

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.

In the instant case, the petitioner submits a PWD from the Pennsylvania Department of Labor and Industry. The PWD was determined on June 18, 2007 and the PWD indicates that this prevailing wage is valid until September 30, 2007. The record shows that the instant Schedule A application was filed on October 19, 2007. The PERM regulations expressly state that an employer must file its application within the validity period specified by the SWA. In the instant case, the petitioner did not

[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). 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).

file its Schedule A application within the validity period specified by the Pennsylvania Department of Labor and Industry. Therefore, the petitioner failed to comply with the regulatory requirements with respect to the PWD validity period.

On appeal, counsel states that the PWD was modified after the initial determination and that 90 days should be afforded from the date of modification in which to file the application. In support of the statements, the petitioner submitted a PWD with an office and status date of June 18, 2007 for a prevailing wage for a Level 4 position, a letter dated July 23, 2007 from counsel to the Pennsylvania Department of Labor and Industry requesting a reconsideration of the PWD under a Level 3 wage level, and a PWD with an office date of June 18, 2007 and a status date of July 30, 2008. 20 C.F.R. § 656.40(c) states that the validity period must be no less than 90 days from the determination date. The determination date here is the original June 18, 2007 date. Although supplementation and re-evaluation of the skill level is provided for under 20 C.F.R. § 656.40(h), any resulting amendment does not change the determination date from which the validity period is calculated. September 30, 2007, the date specified on the PWD as the end of the validity period, is 104 days from the determination date of June 18, 2007. As a result, the validity period of the PWD falls within the time parameters set forth by 20 C.F.R. § 656.40(c) and the petitioner must have filed the Form I-140 during this period. As the Form I-140 was not filed until October 19, 2007, 19 days after the PWD expired, and the petitioner did not demonstrate that it began recruitment as required by §§ 656.17(d) or 656.21 during that period, the application was not filed with a valid PWD and may not be approved.

Beyond the decision of the director, the petitioner failed to demonstrate that it is an active entity capable of sustaining a bona fide job offer. The AAO sent a Notice of Derogatory Information (NDI) dated December 20, 2011 to the petitioner requesting evidence concerning its business in light of its withdrawn status with the State of Georgia.[3] The AAO noted that an inactive business would render the petition and the appeal moot.

In response to the NDI, counsel stated that the petitioner, [redacted], was acquired by [redacted] which combined [redacted] with two other subsidiaries to form [redacted] Counsel further states that [redacted] later changed its name to [redacted] Counsel submitted evidence demonstrating that [redacted] is registered with the State of Georgia and is also registered in Pennsylvania, the state in which the position is offered.

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). As [redacted] is a different entity than the petitioner/labor certification employer and appellant, it must establish that it is a successor-in-interest to the petitioner. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

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[3] The AAO cited the Georgia Secretary of State official website in the NDI, which showed the petitioner's status as withdrawn. *See* http://corp.sos.state.ga.us/corp/soskb/Corp.asp?331901 (originally accessed November 17, 2011 and a copy of which provided with the NDI).

A valid successor relationship may be established for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The petitioner listed on the ETA Form 9089 and Form I-140 is [redacted] located at [redacted] with a Tax Identification Number of [redacted] also submitted the Form I-290B on October 15, 2008. In response to the NDI, counsel submitted annual reports for [redacted] with an address of [redacted] The annual reports state that Inverness [redacted] acquired [redacted] on May 9, 2008 and subsequently merged [redacted] and [redacted], two other companies acquired by [redacted] Inc. in 2007. Counsel further submitted documentation demonstrating that [redacted] was incorporated on the same day that [redacted] was withdrawn.

The response to the NDI does not satisfy all three conditions described above because it does not include any evidence of the transfer of ownership that would describe the nature of the acquisition or merger to demonstrate that [redacted] and/or [redacted] assumed the essential rights and obligations of [redacted] necessary to carry on the business. Nor did the NDI response contain any evidence that the nature of the position being offered by a separate subsidiary is the same as the position described on the ETA Form 9089 or even that the position is still open. Accordingly, the petition must also be denied because the petitioner has failed to establish that [redacted] is its successor-in-interest to the petitioner/labor certification employer and appellant.[4]

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires an Associate's degree in Nursing plus 36 months of experience as a care manager. On the labor certification, the

[4] The petitioner's attorney has not entered an appearance on behalf of [redacted] and that company has not requested to be recognized as a successor-in-interest.

beneficiary claims to qualify for the offered position based on experience with the petitioner as a care manager.

Representations made on the certified ETA Form 9089 clearly indicate that the beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position.[5] Specifically, the petitioner indicates that questions J.19 and J.20, which ask

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[5] 20 C.F.R. § 656.17 states:

> (h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation
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> . . . . .
>
> (4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and
>
> > (i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.
> >
> > (ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).
>
> (1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.
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> (2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.
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> (3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:
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> > (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
> > (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

about experience in an alternate occupation, are not applicable. In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that 36 months of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is not acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may not be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable[6] and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that her position with the petitioner was as a care manager, and the job duties are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as she was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8

> (4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.
>
> (5) For purposes of this paragraph (i):
>
> > (i) The term ''employer'' means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
> > (ii) A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

[6] A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

> 5) For purposes of this paragraph (i):
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> . . .
>
> (ii) A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

C.F.R. § 204.5(l)(3)(ii)(A). The petitioner submitted no letters from employers to demonstrate that the beneficiary had the experience required. It did submit a letter dated August 7, 2007 from its Vice President of Human Resources Compliance & Relations detailing past experience, however, this evidence is not the type specified by 8 C.F.R. § 204.5(l)(3)(ii)(A) and therefore cannot be considered in determining whether the beneficiary had the required experience as of the priority date. For this additional reason, the petition may not be approved.

Also beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

The record before the director closed on October 19, 2007 with the receipt by the director of the petitioner's original submissions. The record does not any contain annual reports, federal tax returns, or audited financial statements for the petitioner. The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date. For this additional reason, the petition must be denied.

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.