(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: FEB 0 5 2013 OFFICE: NEBRASKA SERVICE CENTER FILE

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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Rachel M Jones
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a skilled nursing facility. It seeks to employ the beneficiary permanently in the United States as a licensed vocational nurse. 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).[1]

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is September 4, 2002. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner failed to demonstrate that the beneficiary possessed the minimum experience required to perform the offered position as of the priority date.

The record shows that the appeal is properly filed 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.

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]

On appeal, counsel submits a brief; copies of IRS Forms W-2, which were issued to the beneficiary by in 2001; and copies of pay statements issued to the beneficiary by in 2001 and 2002. On appeal, counsel asserts that, although two years of the beneficiary's claimed work experience was performed as a nursing assistant, the position is similar to the proffered position and should, therefore, be considered as qualifying experience. Counsel asserts that, in 2001 and 2002, the

[1] 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), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

[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 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).

beneficiary worked for two companies concurrently and that therefore each position should be considered as qualifying in its own right. Counsel asserts that, even if U.S. Citizenship and Immigration Services (USCIS) does not consider the beneficiary to have obtained the required experience as of the priority date, the beneficiary obtained the required experience by the time the labor certification was approved and by the time the Form I-140 petition was filed. Counsel asserts that, when the DOL certified Form ETA 750, it knew and acknowledged that the beneficiary was qualified for the proffered position.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating 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. 1986). *See also Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed (e.g., by regulation), USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION
Grade School: Complete
High School: Complete
College: Complete
College Degree Required: None
Major Field of Study: None
TRAINING: None Required.
EXPERIENCE: Two (2) years in the job offered

OTHER SPECIAL REQUIREMENTS: Must have a valid California licensed vocational nurse (LVN) license

The labor certification states that the beneficiary qualifies for the offered position based on having completed licensed vocational nursing school in June 2001.

Additionally, the labor certification states that the beneficiary qualifies for the offered position based on experience as a licensed vocational nurse with from November 2001 until the date upon which the beneficiary signed the labor certification (August 29, 2002). The labor certification also states that the beneficiary qualifies for the offered position based on experience as a licensed vocational nurse with from July 1999 until the date upon which the beneficiary signed the labor certification. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains an experience letter from LVN, on letterhead, stating that the company employed the beneficiary as a certified nursing assistant from July 28, 1999 until October 22, 2001 and then as a licensed vocational nurse from October 22, 2001 until the date of the letter, July 29, 2002. However, the letter does not include any of the duties which the beneficiary was responsible for performing in either capacity and does not indicate whether the beneficiary worked on a full-time or part-time basis.

In response to the director's February 4, 2009 request for additional evidence (RFE), the petitioner submitted a second letter from dated April 16, 2009 and authored by RN, director of nursing services. In her letter, states that the beneficiary was employed by as a certified nursing assistant, on a full-time basis, from July 28, 1999 until October 22, 2001. further states that, from October 22, 2001 onward, the beneficiary was employed by as a licensed vocational nurse.

Whereas the beneficiary claimed on Form ETA 750B that she worked as a licensed vocational nurse for from July 1999 until the date upon which she signed the labor certification, the employment letters actually state that she was employed as a certified nursing assistant from July 1999 until October 22, 2001. The letters further state that the beneficiary was only employed as a licensed vocational nurse from October 22, 2001 onward. If the attestations contained in the employment letters are correct, then the beneficiary's claims on Form ETA 750B

are false, and the pay statements submitted on appeal would seem to corroborate the statements made in the employment letters. Prior to November 2001, the beneficiary was being paid at an hourly rate of approximately $10.00 to $11.65. However, from November 2001 onwards, the beneficiary was being paid at an hourly rate of approximately $18.00.[3] The marked increase in the rate of pay would correspond with a promotion.

In the decision to deny, the director addressed the fact that the beneficiary's employment with was primarily as a certified nursing assistant and not as a licensed vocational nurse. On appeal, counsel acknowledges the truth of the employment letters and asserts that the beneficiary's work as a certified nursing assistant was so similar to her work as a licensed vocational nurse that it should be considered qualifying experience.

However, Form ETA 750 includes the special requirement in Section 15 that the prospective licensed vocational nurse have a valid California LVN license, this fact alone clearly distinguishing the nature of the position. According to the documentary evidence in the record, the beneficiary did not obtain her California LVN license until after June 2001 and could not, therefore, function as a LVN until such license had been obtained.[4]

Therefore, the evidence indicates that the beneficiary's claims on Form ETA 750B were not true. Further, the beneficiary represented herself as having more experience, at least with than she actually had and did so with the intent of obtaining the certified Form ETA 750, the approval of Form I-140, and, ultimately, permanent residence.

See section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

---

[3] The petitioner copied three pay checks per page and submitted these documents as evidence. One page contains a copy of a check dated September 23, 2001. The beneficiary was paid $468.56 for 40.22 hours of work or an hourly rate of $11.65. The page also contains a copy of a check dated March 23, 2001. According to this check, the beneficiary was paid $320.21 for 31.83 hours of work or an hourly rate of $10.06. However, the page also contains a copy of a check dated November 21, 2001. According to this check, the beneficiary was paid $1,007.10 for 55.95 hours of work or an hourly rate of $18.00. The last check, paid in October 2001, is dated October 25. According to this check, the beneficiary was paid $733.02 for 62.92 hours of work or an hourly rate of $11.65.

[4] The Vocational Nursing Practice Act, Article 2 states:

> **2861. Services by Unlicensed Persons.**
> This chapter does not prohibit the performance of nursing services by any person not licensed under this chapter; provided, that such person shall not in any way assume to practice as a licensed vocational nurse. (Added by Stats. 1951, Ch. 1689.)

See also 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

> (d) finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

The employment letters and statements made by the petitioner and counsel indicate that the beneficiary misrepresented the amount of qualifying experience, which she identified on Form ETA 750B, and did so to render herself qualified for the proffered position when, in fact, she was not. Further, the fact that the beneficiary made such a misrepresentation with the intent of securing the certification of Form ETA 750 and then approval on Form I-140 indicates that the misrepresentation was willful. As such, Form ETA 750 is subject to invalidation.

Given the statements made in the employment letters, the evidence indicates that the beneficiary completed only 10 months of experience as an LVN with as of the priority date of the instant visa petition and not the 25 months claimed on Form ETA 750B.

The record contains a letter dated April 16, 2009 from RN, director of nursing, on letterhead. According to e beneficiary worked for s a licensed vocational nurse from November 1, 2001 until the date of the letter.

However, with her Application to Register Permanent Residence or Adjust Status, Form I-485, the beneficiary of the instant petition submitted a letter dated July 17, 2007 from owner, on doing business as letterhead. In her letter, states that the beneficiary had been employed by from 2001 to the present (July 17, 2007).

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

These two letters submitted as evidence claim that the beneficiary worked for and at the same time.

The record of proceeding contains copies of IRS Forms W-2, which the petitioner issued to the beneficiary in 2001, indicating that paid the beneficiary in 2001 and onward. The record also contains a business license for , which also contains the fictitious business name, Additionally, the petitioner's federal income tax returns identify two

facilities as operating under the petitioner's corporate name: Counsel for the petitioner corroborates this information in the letter which he submitted in response to the director's RFE, stating:

> has been in business since April 1999. It owns two facilities with 25 beds, and with 35 beds) where employer employs approximately (70) employees.

Therefore, based upon the documentary evidence in the record of proceeding and counsel's statement, even though the record contains inconsistent information regarding at which specific location the beneficiary worked, the evidence does indicate that the beneficiary worked for Inc., and, thus, the experience which the beneficiary claimed with was actually gained while working with the petitioning entity in the job offered.

Regarding the claimed experience with the petitioner, 20 C.F.R. § 656.21(b)(5) [2004] states:

> The employer shall document that its requirements for the job opportunity, as described, represent the employer's *actual minimum requirements* for the job opportunity, and the **employer has not hired workers with less training or experience** for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

[Emphasis added.]

When determining whether a beneficiary has the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered. This position is supported by the Board of Alien Labor Certification Appeals (BALCA). *See Delitizer Corp. of Newton,* 88-INA-482, May 9, 1990 (BALCA):

> [W]here the required experience was gained by the alien while working for the employer in jobs other than the job offered, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.[5]

---

[5] In a subsequent decision, the BALCA determined that the list of factors for determining whether jobs are sufficiently dissimilar as stated in *Delitizer* is not an exhaustive list. *See E & C Precision Fabricating, Inc.*, 1989-INA-249 (Feb. 15, 1991) (en banc).

In *Delitizer*, BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6)[6] in requiring one year of experience where the beneficiary gained all of his experience while working for the petitioning employer. After analysis of other BALCA and pre-BALCA decisions,[7] the Board in *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require that employers establish "the 'dissimilarity' of the position offered for certification from the position in which the alien gained the required experience." *Delitizer Corp. of Newton*, at 4. In its decision, BALCA stated that Certifying Officers should consider various factors to establish that the requirement of dissimilarity under 20 C.F.R. § 656.21(b)(6) has been met, and that, while Certifying Officers must state the factors considered as a basis for their decisions, the employer bears the burden of proof in establishing that the positions are dissimilar. *Delitizer Corp. of Newton*, at 5.

In the instant case, representations made on the certified Form ETA 750 clearly indicate that the actual minimum requirements for the offered position are two years of experience in the job offered and that experience in an alternate occupation is not acceptable. As the actual minimum requirements are two years of experience, the petitioner could not hire workers with less than two years of experience for the same position. *See* 20 C.F.R. § 656.21(b)(5) [2004].[8] In its letter of April 16, 2009, the petitioner (as [redacted] states that it employed the services of the beneficiary for the following duties:

> Participate in planning and implementing for care and instruction of patients; Record pertinent patient information in medical records; Report patient needs to the appropriate medical and nursing staff; Feed, bath [sic], dress and care for patients; Position and exercise patients following prescribed procedures and techniques; Apply and change dressings using aseptic techniques; Take and record temperature, pulse, respiration and blood pressure; Collect and assist in the collection of specimens, blood samples, urine samples and other clinical sample material for testing; Assist medical professionals in procedure as instructed; Administer prescribed treatments and medications including injections; Inventory and order medications; Follow appropriate instruction by the In-Service Department and State Certification; Reassure and calm agitated patients in an informative and sensitive

---

[6] 20 C.F.R. § 656.21(b)(5) [2004].

[7] See *Frank H. Spanfelner, Jr.*, 79-INA-188, May 16, 1979; *Mecta Corp.*, 82-INA-48, January 13, 1982; *Inakaya Restaurant d/b/a Robata*, 81-INA-86, December 21, 1981; *Visual Aids Electronics Corp.*, 81-INA-98, February 19, 1981; *Yale University School of Medicine*, 80-INA 155, August 13, 1980; *The Langelier Co., Inc.*, 80-INA-198, October 29, 1980; *Creative Plantings*, 87-INA-633, November 20, 1987; *Brent-Wood Products, Inc.*, 88-INA-259, February 28, 1989.

[8] In hiring a worker with less than the required experience for the offered position, in violation of 20 C.F.R. § 656.21(b)(5) [2004], the employer indicates that the actual minimum requirements are, in fact, not as stated on Form ETA 750. Rather, in that the beneficiary was hired in the offered position with less than two years of experience, it is evident that the job duties of the offered position can be performed with less than the two years of experience listed on Form ETA 750. Therefore, two years of experience as an LVN cannot be the actual minimum requirement for the offered position of LVN.

manner; Screen patients for risk factors; Recommend treatment for common ailments using standard protocol manuals and with registered nurse or physicians review; Orient and teach new staff members of the nursing department. Assign and supervise duties and responsibilities of other staff members as a team leader; Participate in instructional program to maintain level of expertise.

These duties closely match the duties of the offered position of LVN, as stated by the petitioner in Item 13 of Form ETA 750:

> Provides prescribed medical treatment & personal care services to patients in the skilled nursing facility: Takes & records patients' vital signs. Dresses wounds, gives enemas, douches, alcohol rubs & massages. Applies compresses, ice bags & hot water bottles. Observes patients & reports adverse reactions to medication or treatment to medical personnel in charge. Administers specified medication, orally or by subcutaneous or intermuscular injection & notes time & amount on patients' charts. Assembles & uses such equipment as catheters, tracheotomy tubes & oxygen suppliers. Collects samples, such as urine, blood & sputum, from patients for testing & performs routine laboratory tests on samples. Sterilizes equipment & supplies, using germicides, sterilizer, or autoclave. Prepares or examines food trays for prescribed diet & feeds patients. Records food & fluid intake & output. Bathes, dresses & assists patients in walking & turning. Cleans rooms, makes beds & answers patients' calls.

Experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without evidence that the DOL conducted a *Delitizer* analysis of the dissimilarity of the position offered and the position in which the beneficiary gained experience with the petitioner. In the instant case, on Form ETA 750, Part B, the beneficiary claimed that she had been employed by which is a DBA for the petitioning corporation, but she did not identify as a DBA of the petitioning corporation, The beneficiary did not specify that she had been employed by the petitioner, in any position. Therefore, the DOL was precluded from conducting a *Delitizer* analysis of the dissimilarity of the offered position and the position in which the beneficiary gained experience.[9] However, even if the petitioner made it clear that were one and the same entity, the petitioner has provided no documentary evidence demonstrating that the DOL conducted a *Delitizer* analysis of the dissimilarity of the offered position and the position in which the beneficiary gained her qualifying experience.

---

[9] The fact that the beneficiary's experience with the petitioner was not mentioned on Form ETA 750, Part B also precludes the consideration of this experience to establish that the beneficiary had the qualifications stated on the labor certification application, as certified by the DOL. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

Furthermore, in her July 17, 2007 letter, expressly states that the beneficiary was employed by in the role of licensed vocational nurse, which is the job offered.[10] As discussed above, in order to utilize the experience gained with the employer, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. *Delitizer Corp. of Newton,* 88-INA-482, May 9, 1990 (BALCA). The petitioner failed to establish the dissimilarity between the position that the beneficiary has held with the employer and the permanent position offered. Therefore, the AAO cannot consider the beneficiary's experience gained with the petitioner as qualifying experience to meet the requirements of the labor certification as of the priority date.

In general, experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without invalidating the actual minimum requirements of the position, as stated by the petitioner on the Form ETA 750. In the instant case, as the beneficiary's experience gained with the petitioner was in the position offered, the petitioner cannot rely solely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant Form I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

Therefore, the only claimed experience which may be considered are the ten months during which the beneficiary was employed by as a licensed vocational nurse.

On appeal, counsel asserts that, although two years of the beneficiary's claimed work experience was performed as a nursing assistant, the position is similar to the proffered position and should therefore be considered as qualifying experience.

However, Form ETA 750 does not provide for the consideration of work performed in an alternate occupation. Had the petitioner intended to permit the consideration of experience gained in such positions as nursing assistant or as nurse aide, it could have so stipulated in Section 14 of Form ETA 750.

Further, according to Article 2 of the Vocational Nursing Practice Act (of California), a licensed vocational nurse is a specific occupation which requires unique training and which entails specific duties which do not apply to nursing assistants.[11] According to the VNPA:

2859. Practice of Vocational Nursing; Vocational Nurse.

---

[10] This is notwithstanding the fact that the petitioner provided a letter in response to the director's RFE, stating that the beneficiary had been employed by and not

[11] *See* http://www.bvnpt.ca.gov/pdf/vnregs.pdf (accessed October 22, 2012).

The practice of vocational nursing within the meaning of this chapter is the performance of services requiring those technical, manual skills acquired by means of a course in an accredited school of vocational nursing, or its equivalent, practiced under the direction of a licensed physician, or registered professional nurse, as defined in Section 2725 of the Business and Professions Code.

A vocational nurse, within the meaning of this chapter, is a person who has met all the legal requirements for a license as a vocational nurse in this State and who for compensation or personal profit engages in vocational nursing as the same is hereinabove defined. (Added by Stats. 1951, Ch. 1689.)

2860.5. Permissible Practices.

A licensed vocational nurse when directed by a physician and surgeon may do all of the following:

(a) Administer medications by hypodermic injection.
(b) Withdraw blood from a patient, if prior thereto such nurse has been instructed by a physician and surgeon and has demonstrated competence to such physician and surgeon in the proper procedure to be employed when withdrawing blood, or has satisfactorily completed a prescribed course of instruction approved by the board, or has demonstrated competence to the satisfaction of the board.
(c) Start and superimpose intravenous fluids if all of the following additional conditions exist:
(1) The nurse has satisfactorily completed a prescribed course of instruction approved by the board or has demonstrated competence to the satisfaction of the board.
(2) The procedure is performed in an organized health care system in accordance with the written standardized procedures adopted by the organized health care system as formulated by a committee which includes representatives of the medical, nursing, and administrative staffs. "Organized health care system," as used in this section, includes facilities licensed pursuant to Section 1250 of the Health and Safety Code, clinics, home health agencies, physicians' offices, and public or community health services. Standardized procedures so adopted will be reproduced in writing and made available to total medical and nursing staffs. (Amended by Stats. 1974, Ch. 1084.)

2860.7. Skin Tests and Immunizations.

(a) A licensed vocational nurse, acting under the direction of a physician may perform: (1) tuberculin skin tests, coccidioidin skin tests, and histoplasmin skin tests, providing such administration is within the course of a tuberculosis control program, and (2) immunization techniques, providing such administration is upon standing

> orders of a supervising physician, or pursuant to written guidelines adopted by a hospital or medical group with whom the supervising physician is associated.

However, according to the California Statutes, Health and Safety Code, Section 1337:

> (3) "Certified nurse assistant" means any person who holds himself or herself out as a certified nurse assistant and who, for compensation, performs basic patient care services directed at the safety, comfort, personal hygiene, and protection of patients, and is certified as having completed the requirements of this article. These services shall not include any services which may only be performed by a licensed person and otherwise shall be performed under the supervision of a registered nurse, as defined in Section 2725 of the Business and Professions Code, or a licensed vocational nurse, as defined in Section 2859 of the Business and Professions Code.

The two occupations differ in their level of responsibility and in the duties required to perform them. Licensed vocational nurses perform more clinical duties, under the direction of a registered nurse or a physician and are, therefore, required to be licensed. The same does not hold for certified nursing assistants.

On appeal, counsel asserts that, in 2001 and 2002, the beneficiary worked for two companies concurrently and that therefore each position should be considered as qualifying in its own right.

As has already been explained, the experience which the beneficiary gained while working for the petitioning entity may not be considered as having qualified the beneficiary for the proffered position. Therefore, the only experience which may be considered is the 10 months during which the beneficiary worked for [redacted] in the role of a licensed vocational nurse (as of the priority date). This is not sufficient to qualify the beneficiary for the proffered position.

On appeal, counsel asserts that, even if USCIS does not consider the beneficiary to have obtained the required experience as of the priority date, the beneficiary obtained the required experience by the time the labor certification was approved and by the time the Form I-140 petition was filed.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *See Matter of Wing's Tea House*, 16 I&N Dec. at 158.

On appeal, counsel asserts that, when DOL certified Form ETA 750, it knew and acknowledged that the beneficiary was qualified for the proffered position.

DOL's certification of the Form ETA 750 does not supercede USCIS' review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that includes a review of whether or not the beneficiary is qualified for the proffered position, which in this case, is governed by section 203(b)(3)(A)(i) of the Act and 8 C.F.R. § 204.5(l)(3).

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

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.