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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAY 3 1 2013 OFFICE: TEXAS 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the immigrant visa petition. On September 8, 2009, the petitioner filed an untimely motion to reopen and reconsider the director's decision. The director dismissed the motion to reopen and reconsider on November 16, 2009 for failing to overcome the original grounds for denial and meet the requirements of a motion to reopen and reconsider. On December 28, 2009, the petitioner filed an untimely appeal of the director's November 16, 2009 decision. The director accepted the untimely appeal as a motion to reopen and reconsider. On March 17, 2010, the director again dismissed the motion to reopen and reconsider failing to overcome the original grounds for denial and meet the requirements of a motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a hospital. It seeks to permanently employ the beneficiary in the United States as a staff registered 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 director denied the petition because the petitioner failed to provide proper notice of the filing of an ETA Form 9089, Application for Permanent Employment Certification, in accordance with 20 C.F.R. § 656.10(d)(3)(iv) and failed to sign the petition in accordance with 8 C.F.R. § 103.2(a)(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.

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 petition is for a Schedule A occupation. A Schedule A occupation is an occupation codified at 20 § C.F.R. 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the

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

employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.*

Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified ETA Form 9089. *See* 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i); *see also* 20 C.F.R. § 656.15.

If the Schedule A occupation is a professional nurse, the petitioner must establish that the beneficiary has a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). *See* 20 C.F.R. § 656.5(a)(2).

Petitions for Schedule A occupations must also contain evidence establishing that the employer provided its U.S. workers with notice of the filing of an ETA Form 9089 (Notice) as prescribed by 20 C.F.R. § 656.10(d), and a valid prevailing wage determination (PWD) obtained in accordance with 20 C.F.R. § 656.40 and 20 C.F.R. § 656.41. *See* 20 C.F.R. § 656.15(b)(2).

For the Notice requirement, the employer must provide notice of the filing of an ETA Form 9089 to any bargaining representative for the occupation, or, if there is no bargaining representative, by posted notice to its employees at the location of the intended employment. *See* 20 C.F.R. § 656.10(d)(1).

The regulation at 20 C.F.R. § 656.10(d)(3) states that the Notice 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.

Notices for Schedule A occupations must also contain a description of the job offered and the rate of pay. *See* 20 C.F.R. § 656.10(d)(6).

In cases where there is no bargaining representative, the Notice must be posted for at least 10 consecutive business days, and it must be clearly visible and unobstructed while posted. 20 C.F.R. § 656.10(d)(1)(ii). The Notice must be posted in a conspicuous place where the employer's U.S. workers can readily read it on their way to or from their place of employment. *Id.* In addition, the Notice must be published "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." *Id.* The satisfaction of the Notice requirement may be documented by

"providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media" used to distribute the Notice. *Id.*

In the instant case, there is no evidence in the record of a bargaining representative for the occupation. The Notice in the record is deficient as it was posted from June 25, 2007 to July 23, 2007, and was therefore not completed between 30 and 180 days of filing.

On appeal, the petitioner argues that it posted the Notice for longer than ten days, and therefore, it should not have to wait 30 days after removing the Notice to file the petition and labor certification as there was sufficient time for any potential U.S. workers to respond. The Notice was posted for 28 days from June 25, 2007 to July 23, 2007. The petition and labor certification were filed 22 days later on August 13, 2007. However, the regulation at 20 C.F.R. § 656.10(d)(3)(iv) makes clear that the Notice "shall be provided between 30 and 180 days before filing the application." Therefore, the Notice is deficient as it was not completed between 30 and 180 days of filing the labor certification.

As set forth in the director's decision, another issue in this case is that the petitioner failed to properly file the petition. The regulation at 8 C.F.R. § 103.2(a)(2) states, "an applicant or petitioner must sign his or her application or petition."

On appeal, the petitioner submits a letter dated April 14, 2010 from RN, MA, CNAA, for the petitioner. The letter states the petition was signed and delivered to and that it was submitted timely. The petition in the record is not signed by the petitioner. As required by the regulation at 8 C.F.R. § 103.2(a)(2), the petition must be signed by the petitioner. As the petition in the record is not signed by the petitioner, it is not properly filed and must also be denied for this reason.

Beyond the decision of the director,[3] there are inconsistencies between the ETA Form 9089 and the PWD submitted with the petition. The petitioner must obtain a PWD and file the petition and accompanying ETA Form 9089 with USCIS within the validity period specified on the PWD. *See* 20 C.F.R. § 656.40(c). The instant petition and ETA Form 9089 were filed on October 4, 2007. The PWD in the record of proceeding is dated July 23, 2007 with validity dates of July 23, 2007 to June 30, 2008. The PWD is $66,0000 per year. The prevailing wage information on the ETA Form 9089 Part F is different than the information contained in the PWD. In Part F of the ETA Form 9089 the prevailing wage information contains a wage rate of $25.43 per hour ($52,894.40 per year) and contains a different tracking number and validity dates from the PWD submitted with the petition

[3] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

and the ETA Form 9089. The PWD determination date listed on the ETA Form 9089 is April 18, 2007 with an expiration date of July 17, 2007. Therefore, the prevailing wage information listed on the ETA Form 9089 was no longer valid upon filing the petition and ETA Form 9089 on August 13, 2007. The record does not include any explanation of these discrepancies. This inconsistency must be resolved with any further filings.

Also, beyond the decision of the director, the petitioner has failed to meet the requirements of the posting notice pursuant to 20 C.F.R. § 656.10(d)(3).

The regulation at 20 C.F.R. § 656.10(d)(3) requires the following:

> The notice of the filing of an Application for Permanent Employment Certification must:
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> (i) State 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.

The posting failed to meet the requirements of 20 C.F.R. § 656.10(d)(3)(iii), as it does not provide the address of the appropriate Certifying Officer. For employment in New York, the proper address of the appropriate Certifying Officer[4] is:

> United States Department of Labor
> Atlanta National Processing Center
> Harris Tower
> 233 Peachtree Street, N.E., Suite 410
> Atlanta, Georgia 30303

The posting does not meet the requirements for posted notices to the employer's employees as set forth at 20 C.F.R. § 656.20(d)(3)(iv).[5]

Also 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

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[4] *See* http://www.foreignlaborcert.doleta.gov/perm.cfm (accessed May 28, 2013).

[5] *See* http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_3-3-05.pdf

of the labor certification, nor may it impose additional requirements. *See 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 and 24 months of training in nursing, as part of an educational degree requirement. A foreign equivalent degree is accepted. Part H.11 of the labor certification states that a "graduate of an accredited school of nursing" is required. Additionally, Part H.14 of the labor certification states that a "CGFNS Certificate or NCLEX Pass" is required.

On the labor certification, the beneficiary claims to qualify for the offered position based on a three-year diploma in nursing from India completed in 1996. The record contains a copy of the beneficiary's diploma and transcripts from issued in May 1996. The record also contains two copies of Certificates of Registration for Midwife issued on September 24, 1996 by the for training courses taken from January 20, 1995 to January 19, 1996 and January 20, 1993 to January 19, 1995; a copy of the beneficiary's registration certificate from the Office of Professions, valid through April 30, 2010 as proof of registration to practice as a registered nurse; a copy of the beneficiary's license to practice as a registered professional nurse issued by the dated May 23, 2007; a copy of the beneficiary's resume; and two experience letters from and

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, www.aacrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." http://www.aacrao.org/About-AACRAO.aspx (accessed May 15, 2013). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://edge.aacrao.org/info.php (accessed May 15, 2013). Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[6] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[7]

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[6] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

[7] In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court

According to EDGE's credential advice, a diploma in nursing is comparable to "up to one year of university study in the United States. Credit may be awarded on a course-by-course basis." A copy of the EDGE printout is attached. The record does not contain an evaluation of the beneficiary's credentials. Thus, the petitioner has not demonstrated that the beneficiary possesses an Associate's degree in Nursing as required by the terms of the labor certification.

In Part H.11, the labor certification requires graduation from an accredited school of nursing. There is nothing in the record to demonstrate that the beneficiary graduated from an accredited school of nursing. Additionally, the labor certification requires a CGFNS Certification or NCLEX Pass. The beneficiary indicates on her resume that she possesses both a CGFNS certificate and has passed the NCLEX examination. The record, however, does not contain independent, objective evidence that the beneficiary meets either requirement. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The evidence in the record does not establish that the beneficiary possessed the required education and special skills as set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 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'r 1988).

The director properly denied the petition because the petitioner failed to provide proper notice of the filing of an ETA Form 9089, Application for Permanent Employment Certification, in accordance with 20 C.F.R. § 656.10(d)(3)(iv) and failed to sign the petition in accordance with 8 C.F.R. § 103.2(a)(2).

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determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

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.

ATTACHMENT