

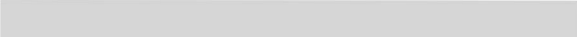



U.S. Citizenship  
and Immigration  
Services


(b)(6)



DATE: **MAY 01 2015** OFFICE: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)


ON BEHALF OF PETITIONER:  


INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Texas Service Center Director (the director) approved the immigrant visa petition on March 8, 2013. The director revoked the approval of the petition on August 29, 2013 and dismissed a motion to reopen and reconsider on November 13, 2013. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be affirmed in part and withdrawn in part. The appeal will be dismissed. The petition remains revoked.

The petitioner describes itself as a staffing business that seeks to permanently employ the beneficiary in the United States as a nurse supervisor. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

On August 29, 2013, the director revoked the petition on three grounds: (1) the educational requirement for the nursing profession is no higher than a bachelor of science degree, making the job offer appropriate for a petition for a skilled worker or professional, not an advanced degree professional; (2) the petitioner did not submit evidence that it did not have to file for certification through the U.S. Department of Labor (DOL); and (3) the petitioner did not establish that the beneficiary meets the minimum requirements of the labor certification, specifically the five (5) years of progressive post-baccalaureate experience. On November 13, 2013, the director dismissed a motion to reopen and reconsider for failure to meet the requirements of a motion.

The petitioner's appeal is properly filed, timely and makes a specific allegation of error in law or fact. We conduct appellate review on a *de novo* basis.<sup>1</sup> We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup> 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.

### Revocation

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). Notice must be provided to the petitioner before a previously approved petition can be revoked. See 8 C.F.R. § 205.2; 8 C.F.R. § 103.2(b)(16); *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987).

The Notice of Revocation (NOR) states that the petitioner did not establish that: (1) the educational

<sup>1</sup> See 5 U.S.C. 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); see also *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s *de novo* authority has been long recognized by the federal courts. See, e.g., *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, 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).

requirement for the nursing profession is higher than a bachelor of science degree, making the job offer appropriate for a petition for a skilled worker or professional, not an advanced degree professional; (2) the petitioner failed to submit evidence that it did not have to file for certification through the U.S. Department of Labor (DOL); and (3) the petitioner failed to establish that the beneficiary meets the minimum requirements of the labor certification, specifically the five (5) years of progressive post-baccalaureate experience. The director found that the evidence submitted by the petitioner in response to a Notice of Intent to Revoke (NOIR) failed to overcome these findings. The director's NOIR sufficiently detailed the evidence of the record, pointing out specific evidence or information relating to the inconsistencies and lack of evidence of the beneficiary's qualifying experience that would warrant a denial if unexplained and un rebutted, and thus was properly issued for good and sufficient cause. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.2.

### **Eligibility for the Classification Sought**

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

In the instant case, Part H of the labor certification submitted with the petition states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor's degree in nursing.
- H.5. Training: None required.
- H.6. Experience in the job offered: 60 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: Master's degree.
- H.9. Foreign educational equivalent: Accepted.

H.10. Experience in an alternate occupation: None accepted.

H.14. Specific skills or other requirements: Instead of master degree in Nursing, employer shall accept any combination of education and work experience substantially equivalent to the above requirements, including a bachelor's degree in nursing (or foreign degree equivalent) and/or five years of post-baccalaureate progressive work experience as registered nurse.<sup>3</sup>

At issue on appeal is whether or not the offered position qualifies for advanced degree professional consideration. Since the offered position is not one of the occupations listed at section 101(a)(32) of the Act, the petitioner must establish that it is in an occupation for which an advanced degree is a requirement for entry.<sup>4</sup> In the notice of intent to revoke (NOIR) and notice of revocation (NOR) of the petition's approval the director stated that the proffered position did not qualify for classification as an advanced degree professional. While the director discussed the job duties of a registered nurse and concluded that those job duties did not require an advanced degree professional, the director did not address the proffered position, nurse supervisor, and its duties with regard to whether they met the requirements for classification as an advanced degree professional. As such, on appeal we will analyze whether the proffered position qualifies for advanced degree professional consideration as an occupation for which an advanced degree is a requirement for entry.

According to Part F.2 of the labor certification, the offered position was assigned the O\*NET<sup>5</sup> occupational code of registered nurse and Standard Occupational Code (SOC) 29-1111 based on a prevailing wage determination (PWD) submitted with the petition.<sup>6</sup> While the SOC listed in Part F.2 does not reflect whether the proffered position is an entry-level one, Part F.4 of the labor certification as well as the PWD indicate that the skill level is IV, reflecting that the proffered position is one well beyond that of entry level. Further, the proffered position description of "nurse supervisor" in Part H.11 of the labor certification, reads as follows:

Supervise RNs, LPNs and CNAs, set up work schedules, assign duties to nursing staff, and ensure that each member of the nursing team is adequately trained, ensure that nursing records are correctly maintained, the report is correctly given at each shift change, and that equipment and the other supplies are in stock; plans and organizes activities in nursing services, such as obstetrics, pediatrics, or surgery, or for two or more patient-care units to procedures; coordinate activities with other

<sup>3</sup> We note that the requirements listed in Part H.14 of the labor certification are inconsistent and conflict with the requirements listed in Parts H.6 and H.10. Part H.6 requires experience in the job offered [nurse supervisor] and Part H.10 does not allow for experience in an alternate occupation. However, Part H.14 states that experience in the alternate occupation of registered nurse is acceptable.

<sup>4</sup> An "advanced degree" is defined as: [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree. 8 C.F.R. § 204.5(k)(2).

<sup>5</sup> O\*NET is the occupational classification system used by the DOL and is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations." O\*NET incorporates the Standard Occupational Classification (SOC) system, which is designed to cover all occupations in the United States. See [www.onetonline.org](http://www.onetonline.org); and [www.bls.gov/soc/home.htm](http://www.bls.gov/soc/home.htm).

<sup>6</sup> This occupational code is no longer in use and was replaced by four new codes. See [www.onetonline.org](http://www.onetonline.org).

patient care units. Consult with the Director of Nursing on nursing problems and interpretation of hospital policies to ensure patient needs are met.

A registered nurse does not necessarily require even a bachelor's degree, much less a master's degree. There are three major educational paths to registered nursing – a Bachelor of Science degree in nursing (BSN), an associate degree in nursing (ADN), and a diploma from a hospital. See [www.bls.gov/ooh/healthcare/registered-nurses.htm](http://www.bls.gov/ooh/healthcare/registered-nurses.htm) (accessed December 15, 2014). In general, licensed graduates of any of the three types of educational programs qualify for entry-level nursing positions. According to the DOL's occupational data, a baccalaureate degree is not required for entry into the occupation of registered nurse. However, the proffered position is for a nurse supervisor, a position with greater complexity. The DOL's Occupational Outlook Handbook (OOH) provides that nurses can advance to assistant unit manager or head nurse and that, increasingly, management-level positions require a graduate degree in nursing or health services administration. Thus, the master's degree in nursing required for the proffered position is in line with DOL's occupational data for such a position and qualifies it as an advanced degree professional pursuant to Section 203(b)(2) of the Act.

Accordingly, the job offer portion of the ETA Form 9089 for a nurse supervisor meets the regulatory requirement at 8 C.F.R. § 204.5(k)(4) because it demonstrates that the proffered position requires an advanced degree professional.

#### **Schedule A**

The petition was filed for a Schedule A occupation. A Schedule A occupation is an occupation codified at 20 C.F.R. § 656.5(a) for which the 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 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 (1)(3)(i); see also 20 C.F.R. § 656.15.

The director found that the instant Form I-140 immigrant petition did not meet the requirements for Schedule A because the position was not one for a professional nurse. As discussed above, the offered position is instead for a nurse supervisor. In support of its claim that a nurse supervisor is a Schedule A occupation, the petitioner refers to a decision issued by us concerning a nurse practitioner, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.10. Further, the referenced decision concerns a nurse practitioner and not the proffered position, a nurse supervisor, with supervisory job duties rather than nursing duties.

The petitioner also references the Adjudicators Field Manual regarding Schedule A occupations. While memos may be binding on officers as a supervisor-employee directive pursuant to the Adjudicators Field Manual, memoranda do not create a legal right or obligation that can be enforced in court.<sup>7</sup> Significantly, Chapter 3.4 of the manual also states that a “higher” authority is controlling where a conflict exists. For example, if a directive in a field manual appears to conflict with a regulation, the regulation must be followed. Here, the regulation at 20 C.F.R. § 656.5(a) sets forth the limited positions that qualify for Schedule A classification.

According to the OOH, the job duties for a professional nurse include:

- Record patients’ medical histories and symptoms.
- Administer patients’ medicines and treatments.
- Set up plans for patients’ care or contribute to existing plans.
- Observe patient and record observations.
- Consult with doctors and other healthcare professionals.
- Operate and monitor medical equipment.
- Help perform diagnostic tests and analyze results.

The above job duties are all central to patient care. The job duties of the instant position of nurse supervisor include:

- Supervise RNs, LPNs and CNAs.
- Set up work schedules.
- Ensure that nursing records are correctly maintained, the report is correctly given at each shift change, and that equipment and the other supplies are in stock.
- Plans and organizes activities in nursing services, such as obstetrics, pediatrics, or surgery, or for two or more patient-care units to procedures.

The above job duties do not involve any patient care. Rather the job duties of nurse supervisor as listed on the ETA Form 9089 are focused on administration of nurses. As the job duties of a nurse supervisor as described in the instant petition are substantially different from those of a professional nurse, it has not been established that the proffered position may be classified as a Schedule A occupation, one for which the DOL has determined that there are not sufficient U.S. workers.

Therefore, the petitioner has not established that the proffered job of nurse supervisor is a Schedule A, Group I occupation, as it fits within the definition of professional nurse under 20 C.F.R. § 656.5. The petitioner has not established that a labor certification is not required for the proffered position. The regulation at 8 C.F.R. § 204.5(a)(2) specifies that the Form I-140 petition filed on behalf of the beneficiary must be supported by an individual labor certification from the DOL. If the petition is not supported by a certified ETA Form 9089, the petition cannot be approved.

<sup>7</sup> USCIS memoranda merely articulate internal guidelines for USCIS personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines “neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.” *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O’Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)).

### Beneficiary Qualifications

The petitioner must establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 8 C.F.R. § 103.2(b)(1), (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 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 *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).

We note that the director incorrectly stated that the beneficiary must possess the minimum requirements by October 2, 2009. The beneficiary must possess the minimum requirements set forth on the labor certification by the priority date of the instant petition, which is October 9, 2012, the date on which the Form I-140 immigrant petition was filed. However, we affirm that the petitioner failed to establish that the beneficiary possessed the minimum education and experience by the priority date of October 9, 2012.

Part J of the labor certification states that the beneficiary possesses a master's degree equivalent in nursing from the [REDACTED], the Philippines, issued in 2005. The record contains a copy of the beneficiary's Bachelor of Science in nursing diploma and transcripts from [REDACTED] issued in 2005. The record also contains the beneficiary's Bachelor of Science in Zoology diploma from the [REDACTED], issued in 1988 and her Doctor of Medicine diploma from the [REDACTED], issued in 1992. The transcripts from [REDACTED] reflect the beneficiary's courses and grades for her Bachelor of Science in Zoology and Doctor of Medicine.

The record also contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] completed on December 22, 2008.<sup>8</sup> The evaluation states that the beneficiary's [REDACTED] "official academic transcript for an MD to BSN program" is comparable to a bachelor of science in nursing program in the United States.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).<sup>9</sup> USCIS considers EDGE

<sup>8</sup> USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. See *id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. See also *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

<sup>9</sup> According to its website, 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

to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.<sup>10</sup> According to EDGE, a Bachelor of Science degree from the Philippines is comparable to a bachelor's degree in the United States and a Doctor of Medicine (MD) in the Philippines is comparable to a first professional degree in medicine in the United States.

While the beneficiary holds a professional degree in medicine, it does not meet the requirement of a master's degree in nursing. However, the beneficiary holds a foreign equivalent bachelor's degree in nursing and may meet the minimum requirements of the instant labor certification if she also holds five (5) years (60 months) of post-baccalaureate experience in the proffered position of nurse supervisor.

Part K of the labor certification states that the beneficiary possesses the following employment experience:

- Registered Nurse with [REDACTED] Florida, from January 2010 to January 2012.
- Unknown title with [REDACTED] Florida, from June 2009 to January 2012.
- Registered nurse with [REDACTED] Florida, from July 2012 to September 2012.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

The record contains a September 5, 2012 letter from [REDACTED] international recruitment manager, on [REDACTED] letterhead indicating that the beneficiary was employed in the chest pain unit of the [REDACTED] from January 11, 2010 to January 24, 2012. The petitioner also submitted paystubs for the beneficiary from [REDACTED] reflecting payment for payperiods ending November 26, 2011, November 12, 2011, October 29, 2011 and October 15, 2011.

United States and in over 40 countries around the world." See <http://www.aacrao.org/About-AACRAO.aspx>. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." See <http://edge.aacrao.org/info.php>.

<sup>10</sup> In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court 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" degrees were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc. v. USCIS*, 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 record also contains a July 9, 2012 letter from [REDACTED], M.D., R.N., medical director, on [REDACTED] Philippines, letterhead indicating that the company employed the beneficiary as an ICU staff nurse from September 1, 2005 to April 10, 2008. The letter concerns experience not listed on the labor certification.<sup>11</sup>

While these two letters meet the requirements of 8 C.F.R. § 204.5(g)(1), the job duties listed in the letters reflect that the beneficiary did not perform job duties commensurate with the duties provided on the labor certificate for a nurse supervisor. The primary requirements of the labor certification are a bachelor's degree in Nursing and five years of experience in the job offered [Nurse Supervisor].<sup>12</sup> As such, these letters do not establish that the beneficiary gained experience which would qualify her for the proffered position.

The record contains a September 5, 2012 letter from [REDACTED], international nursing liaison, on [REDACTED] letterhead, indicating that [REDACTED] employed the beneficiary as a registered nurse from February 21, 2012 through September 4, 2012. This conflicts with the labor certification, which states that the beneficiary was employed with [REDACTED] from July 2012.

The record also contains a September 12, 2012 letter from [REDACTED] human resources, on [REDACTED] letterhead indicating that [REDACTED] employed the beneficiary in the chest pain observation unit/cardiac unit from March 16, 2009 to January 5, 2010. This conflicts with the labor certification, which states that the beneficiary was employed with [REDACTED] from June 2009 to January 2012. Further, this letter is also inconsistent with the labor certification regarding the company that employed the beneficiary during the referenced period of time.

While these two letters meet the requirements of 8 C.F.R. § 204.5(g)(1), they are inconsistent with the dates of employment listed by the beneficiary on the labor certification. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, the petitioner does not address the inconsistencies between the [REDACTED] letter, which states that it employed the beneficiary from February 2012 to September 4, 2012, and the labor certification, which states that [REDACTED] employed the beneficiary only from July 2012 until September 2012.

<sup>11</sup> 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. The beneficiary did not list this experience on the labor certification before USCIS.

<sup>12</sup> As noted above, the primary requirements listed on the labor certification in Parts H.6 and H.10 (five years of experience as a nurse supervisor with no alternate occupation allowed) conflict with the requirements listed in Part H.14 (five years of experience as a registered nurse). The petitioner has not provided an explanation for this inconsistency.

In an attempt to clarify the inconsistencies with the [REDACTED] letter, the petitioner submitted paystubs for the beneficiary from [REDACTED] reflecting payment for payperiods ending March 28, 2009, May 9, 2009 and November 7, 2009.<sup>13</sup> While the pay stubs establish that the beneficiary received payments from [REDACTED] during 2009, they do not provide independent objective evidence of whether the beneficiary was employed by [REDACTED] between May 9, 2009 and November 1, 2009 or after November 2009. We note that the address listed for [REDACTED] on the labor certification is the same address as those found on the [REDACTED] paystubs.

Even if the inconsistencies noted above were completely resolved the beneficiary could not meet the requirements of the labor certification because both letters do not indicate that the beneficiary performed job duties for [REDACTED] or [REDACTED] that are commensurate with the duties provided on the labor certificate for a nurse supervisor. As such, these letters do not establish that the beneficiary gained experience which would qualify her for the proffered position.

Therefore, none of the experience listed on the labor certification qualifies as experience in the proffered position.

The petitioner does not establish that the beneficiary possessed the minimum requirements of the offered position set forth on the labor certification by the priority date. Accordingly, the petition must be denied for this reason.

### **Ability to Pay**

Beyond the decision of the director,<sup>14</sup> the petitioner has also not established 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 regulation further provides: “In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer’s ability to pay the proffered wage.” (Emphasis added.)

Given the record as a whole and the petitioner’s history of filing petitions, we find that we need not exercise our discretion to accept the letter from [REDACTED] Chief Financial Officer, which states that the petitioner employs more than 100 workers and has the ability to pay the proffered wage. USCIS records indicate that the petitioner has filed over 80 Form I-140 immigrant petitions on

<sup>13</sup> The petitioner also submitted paystubs for pay periods ending May 25, 2013, June 8, 2013 and July 6, 2013. However, these dates of employment are after the priority date and are therefore not relevant to any qualifying experience for the instant Form I-140 immigrant petition.

<sup>14</sup> We may deny an application or petition that fails to comply with the technical requirements of the law 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 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that we conduct appellate review on a *de novo* basis).

behalf of other beneficiaries since the instant October 9, 2012 priority date. Consequently, USCIS must also take into account the petitioner's ability to pay the beneficiary's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. The record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence.

Moreover, the record does not any contain annual reports, federal tax returns, or audited financial statements for the petitioner from the priority date onwards. 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 not established its continuing ability to pay the proffered wage to the beneficiary since the priority date.

### **Debarred Entity**

We note that, pursuant to a February 18, 2015, Memorandum from Donald Neufeld (Neufeld Memo), the petitioner is listed as a debarred entity. Pursuant to the Neufeld Memo, no immigrant visa petitions and no H, L, O, or P-1 nonimmigrant visa petitions filed with respect to the petitioner shall be approved for a period of one year, commencing on August 1, 2014, and ending on July 31, 2015.<sup>15</sup>

The petitioner in this case was the subject of an investigation by the DOL in accordance with the H-1B provisions of the Act. *See generally* 20 C.F.R. § 655 related to Temporary Employment of Aliens in the United States; and 8 C.F.R. § 214.2(h) provisions related to H-1B nonimmigrants. If DOL determines that there has been a violation of 20 C.F.R. § 655, then under 20 C.F.R. § 655.855(c), USCIS shall not approve a petition during the debarment period: USCIS "shall not approve petitions filed with respect to that employer under sections 204 or 214(c) of the INA (8 U.S.C. 1154 and 1184(c)) for the period of time provided by the Act and described in Sec. 655.810(f)."<sup>16</sup>

<sup>15</sup> See [www.dol.gov/whd/immigration/H1BDebarment.htm](http://www.dol.gov/whd/immigration/H1BDebarment.htm) (accessed March 4, 2015).

<sup>16</sup> We note that certain statutes that preclude USCIS from approving applications effectively require that USCIS deny the application. For instance, the language of Sections 204(c), (d), and (g) of the Act all similarly provide that "notwithstanding [the relevant applicable subsections] . . . no petition shall be approved if [the following facts are present]." Further, on October 21, 1998, President Clinton signed into law the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, which incorporated several immigration-related provisions, including the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). ACWIA mandated new requirements for petitioners filing for H-1B beneficiaries. Pursuant to ACWIA, penalties were established for H-1B violations on a three tier system: (1) the first tier would encompass non-willful conduct, or less substantial violations such as failure to meet strike, lockout or layoff attestations; failure to meet notice or recruitment attestations; or misrepresentation of a material fact on a labor condition application, and would result in fines of not more than \$1,000 per violation and result in the mandatory debarment of at least one year. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(i) of the Act; (2) willful violations, such as willful failure to meet any attestation condition; willful

**Conclusion**

In summary, the petitioner has not established that the proffered position is for a Schedule A occupation, that the beneficiary meets the minimum educational and experience requirements of the instant labor certification or that it has the continuing ability to pay the proffered wage to all of its beneficiaries. Further, the petitioner is a debarred entity. Therefore, the petition cannot be approved in the advanced degree professional preference classification under section 203(b)(2) of the Act. The director's decision revoking approval of the petition is affirmed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

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misrepresentation; or actions taken in retaliation against whistleblowers, which would result in a fine of not more than \$5,000 per violation, and mandatory debarment of two years. See ACWIA § 413(a) incorporated at 212(n)(2)(C)(ii) of the Act; and (3) willful violations that result in layoffs, such as a violation of the attestation, or misrepresentation of a material fact in the course where an employer displaces a U.S. worker, which would result in a fine not to exceed \$35,000 per violation, and mandatory debarment of at least three years. See ACWIA § 413(a) incorporated at 212(n)(2)(C)(iii) of the Act.