

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

(b)(6)

DATE: SEP 11 2015

FILE #: [REDACTED]

PETITION RECEIPT #: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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:

[REDACTED]

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Thank you,



Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). It is now on appeal before the Administrative Appeals Office (AAO). The case will be remanded to the Director for further consideration and the issuance of a new decision.

The petitioner describes itself as a staffing and recruitment company. On June 17, 2013 it filed the instant Form I-140, Immigrant Petition for Alien Worker, seeking to permanently employ the beneficiary in the United States (specifically – in [REDACTED] Vermont) as a registered nurse pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). Under this statutory provision immigrant classification may be granted to members of the professions holding advanced degrees or aliens of exceptional ability in the sciences, arts, or business.

The petition is for a Schedule A occupation. A Schedule A occupation is one 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 employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses. *Id.* “Professional nurse” is defined in 20 C.F.R. § 656.5(a)(3)(ii) as follows:

Professional nurse means a person who applies the art and science of nursing which reflects comprehension of principles derived from the physical, biological and behavioral sciences. Professional nursing generally includes making clinical judgments involving the observation, care and counsel of persons requiring nursing care; administering of medicines and treatments prescribed by the physician or dentist; and participation in the activities for the promotion of health and prevention of illness in others. A program of study for professional nurses generally includes theory and practice in clinical areas such as obstetrics, surgery, pediatrics, psychiatry, and medicine.

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 an uncertified ETA Form 9089 in duplicate. *See* 8 C.F.R. §§ 204.5(a)(2) and (k)(4); *see also* 20 C.F.R. § 656.15.¹

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); or 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). In this case, the record shows that the petitioner passed the NCLEX-RN examination on August 14, 2006, and was issued the applicable CGFNS certificate on March 30, 2013.

¹ The instant petition was filed without the requisite ETA Form 9089. The petitioner furnished an uncertified ETA Form 9089 in duplicate on July 26, 2013, in response to the Director’s Notice of Intent to Deny (NOID) the petition.

The Director denied the petition on August 12, 2013, finding that the proffered position, as described in the petition and in the ETA Form 9089, includes supervisory duties that are not within the definition of a registered nurse or a “professional nurse” as described in 20 C.F.R. § 656.5(a)(3)(ii). The Director noted that “Nurse Supervisor” is entered as the “Nontechnical Description of Job” at Part 6.3 of the I-140 petition,² that “Nurse Supervisor” is the “Job Title” on the ETA Form 9089 (Part H.4), and that the “Job Duties” entered at Part H.11 of the ETA Form 9089 read as follows:

Supervise RNs, LPNs and CANs in the provision of general nursing care to patients. Set up work schedules for subordinates, to ensure quality of care, and ensure that nursing procedures are correctly conducted. Demonstrate correct use of medical equipment (monitoring equipment, EKG, IV-drip, etc.) to newly hired nursing staff. Serve as resource person to the nursing team, in the planning, evaluation, and execution of nursing care. Oversee the conduct of emergency nursing procedures as required by patient symptomology. From time to time, assume floor duties to cover for absent nurses, in addition to overseeing the nursing team.

The Director concluded that the proffered position, because of its supervisory elements, cannot be considered a Schedule A occupation. Accordingly, the petition could not be approved in the absence of a DOL-certified ETA Form 9089.

The petitioner filed a timely appeal on September 12, 2013, accompanied by a brief from counsel and supporting documentation. The petitioner asserts that the Director erred in finding that the proffered nursing position is not a Schedule A occupation simply because there are supervisory components in the job. According to the petitioner, the practice of “registered nursing” includes supervision and management. Among the documents submitted with the appeal are:

1. An excerpt from the Standard Occupational Classification (SOC) of the DOL’s Bureau of Labor Statistics stating that supervisors of workers in the occupational group 29-0000 (“Healthcare Practitioners and Technical Occupations” which include a variety of nursing categories) perform activities similar to those of the workers they supervise, and are thus classified together.
2. An excerpt from The Vermont Statutes Online -- Title 26: Professions and Occupations, Chapter 28: Nursing – which defines “registered nursing” in § 1572(2) as including duties such as “delegating nursing interventions that may be performed by others” (subsection G), “teaching the theory and practice of nursing” (subsection J), and “managing and supervising the practice of nursing” (subsection K).
3. An excerpt from the DOL’s Dictionary of Occupation Titles (DOT) which includes Nurse Supervisors in the list of Registered Nurses (occupational title 075).

² “Registered Nurse” is the “Job Title” entered at Part 6.1 of the I-140 petition.

In reviewing the decision, we find that the job description might be reviewed in consideration of specific duties to determine whether such duties may be encompassed within the definition of a professional nurse. The Director may wish to issue a Request for Evidence to obtain further information about the this issue and the issues identified below, allowing the petitioner a reasonable time to respond. Accordingly, this petition will be remanded to the Director for further review. The Director should take into consideration any materials submitted by the petitioner in response to any request. The Director shall then issue a new decision.

We also note that additional issues not addressed in the Director's initial decision may have to be addressed on remand. For example, since the petition was filed for a professional with an advanced degree,³ the petitioner must establish that the proffered position actually requires an advanced degree professional to perform the duties of the job. If it does not, then the beneficiary would not be eligible for that classification under section 203(b)(2) of the Act. In addition, we note that Part H.14 of the ETA Form 9089, which describes any "specific skills or other requirements" for the job, states that an "RN state license is required." There is no evidence in the record that the beneficiary was licensed as a registered nurse in Vermont, where the work will be performed, at the time the petition was filed. Furthermore, the petitioner submitted a labor certification that is not in accord with the I-140 petition. While the ETA Form 9089 lists the petitioner's FEIN (Federal Employer Identification Number) as [REDACTED] the Form I-140 lists the petitioner's FEIN as [REDACTED]. The petition and the labor certification both indicate that the beneficiary will be working at an offsite location, not at the petitioner's business address. The petitioner has submitted subcontracts with another organization, [REDACTED] of [REDACTED] Kentucky. Therefore, it is unclear what entity will be the beneficiary's actual employer. The above issue(s) must also be resolved.

In visa petition proceedings, the burden of proof is on the petitioner to establish eligibility for the benefit sought. See section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

ORDER: The petition is remanded to the Director for further consideration, in accordance with the foregoing discussion, and the issuance of a new decision.

³ The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree," in pertinent part, as follows:

Advanced degree means any 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.