U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 30594258

Date: APR. 30, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, a healthcare staffing company, seeks to permanently employ the Beneficiary as a registered nurse. The company requests her classification under the employment-based, third-preference (EB-3) immigrant visa category as a "skilled worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). U.S. businesses may sponsor noncitizens to obtain U.S. permanent residence under this category to work in jobs requiring at least two years of training or experience. *Id.*

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the Beneficiary's qualifying experience for the offered job. On appeal, the Petitioner contends that, under longtime immigration service policy, the Beneficiary need not meet the exact job requirements listed on the accompanying "Schedule A" labor certification application.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the company must, and did not, establish the Beneficiary's possession of the minimum job requirements stated on the Schedule A labor certification application. We will therefore dismiss the appeal.

## I. LAW

Immigration as a skilled worker typically follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Second, if DOL approves a position for a foreign worker, an employer must submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Finally, if USCIS grants a petition, the noncitizen beneficiary may apply abroad for an immigrant visa or, if eligible, adjustment of status in the United States. *See* section 245(a) of the Act, 8 U.S.C. § 1255(a).

DOL, however, has predetermined that the United States lacks sufficient "professional nurses" and that noncitizens' employment in these Schedule A jobs would not harm the wages or working conditions of U.S. employees in similar positions. 20 C.F.R. § 656.5. Thus, organizations seeking to employ noncitizen registered nurses need not file individual labor certification applications with DOL to test the U.S. labor market for qualified workers. Rather, DOL authorizes USCIS to adjudicate Schedule A labor certification applications in petition proceedings. 20 C.F.R. § 656.15(a). Thus, in this matter, USCIS rules not only on the immigrant visa petition, but also on its accompanying labor certification application. *See* 20 C.F.R. § 656.15(e) (describing USCIS' determinations on Schedule A labor certification applications as "conclusive and final").

## II. ANALYSIS

The record shows that, in December 2021, the Beneficiary - a Nigerian native and citizen - earned a U.S. bachelor of science degree in nursing. In December 2022, the Petitioner filed this petition, offering her the position of registered nurse at an annual proffered wage of $49,192 and requesting the job's designation under Schedule A as a professional nurse. The company says that it intends to assign the Beneficiary to work at a client hospital in Kansas.

The Petitioner's Schedule A labor certification application states that the offered job requires at least a two-year nursing diploma and one year of experience in the job offered. The application indicates that the company will not accept experience in an alternate occupation. The application also lists other job requirements, including: "[l]icensing or registration;" passage of the National Council Licensure Examination for Registered Nurses (NCLEX-RN); and successful completion of a "criminal background check" and "drug screen."

The Petitioner submitted a copy of the Beneficiary's U.S. nursing degree and letters indicating that, by the petition's filing, she worked about two months as an "advanced nurse extern" at a U.S. hospital in Alabama and about 10 months for the Petitioner in the offered job.

### A. The Schedule A Labor Certification Application

A petition for a skilled worker must include an individual labor certification from DOL or an application for Schedule A designation. 8 C.F.R. § 204.5(l)(3)(i).[1] When adjudicating Schedule A labor certification applications, also called "blanket" labor certification applications, USCIS applies DOL regulations. 20 C.F.R. § 656.15(a).

A Schedule A labor certification employer must offer "[p]ermanent, full-time work" to a noncitizen as a professional nurse. 20 C.F.R. §§ 656.3, 656.5(a)(3)(i), (ii).[2] An employer must also submit a labor certification application form, a DOL determination of the offered job's prevailing wage, and

[1] The regulation also indicates acceptance of proof "that the alien qualifies for one of the shortage occupations in the [DOL]'s Labor Market Information Pilot Program." 8 C.F.R. § 204.5(l)(3)(i). DOL published a proposed rule for the pilot program. *See* 58 Fed. Reg. 26077 (Apr. 30, 1993). But the agency never implemented the program. Thus, the portion of the regulation referencing the pilot program does not apply.

[2] Schedule A also covers "physical therapists" and certain noncitizens of "exceptional ability" in "science or art," or performing arts. 20 C.F.R. § 656.5(a)(3)(i), (b). This matter does not involve a physical therapist occupation or other qualifying work under Schedule A.

evidence that the employer notified a bargaining representative, if applicable, or its employees of the application's filing. 20 C.F.R. § 656.15(b) (referencing 20 C.F.R. §§ 656.10(d), 656.40, 656.41).

The term "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.

20 C.F.R. § 656.5(a)(3)(ii).

An employer seeking to employ a noncitizen professional nurse must further document the noncitizen's receipt of a certificate from the Commission on Graduates of Foreign Nursing Schools, a license to practice nursing in the U.S. state of intended employment, or passage of the NCLEX-RN. 20 C.F.R. § 656.15(c)(2).

The Petitioner demonstrated compliance with the Schedule A labor certification regulations. The company submitted a labor certification application form stating its offer of permanent, full-time work to the Beneficiary as a registered nurse. The Petitioner also submitted a DOL prevailing wage determination (PWD) and a copy of a notice of the application's filing to employees at the proposed worksite.

The record shows that, consistent with a DOL regulation, the Petitioner's PWD remained valid for between 90 days and one year and that the company filed its labor certification application during that period. *See* 20 C.F.R. § 656.40(c). As the Petitioner attested on the application form, the company promised to pay the Beneficiary at least the job's prevailing wage of $49,192 a year.

The Petitioner's posted notice to employees also meets the regulations at 20 C.F.R. § 656.10(d). The notice copy indicates the notice's posting for at least 10 consecutive business days in a conspicuous place at the proposed worksite in Kansas. *See* 20 C.F.R. § 656.10(d)(1)(ii). The notice also describes the offered job and its rate of pay, states that the application's filing spurred the posting, indicates that anyone may provide documentary evidence bearing on the application, and lists the appropriate address of the DOL certifying officer in Washington, D.C. *See* 20 C.F.R. § 656.10(d)(3)(i), (ii), (iii), (6). The record also indicates the notice's posting between 30 and 180 days before the application's filing. *See* 20 C.F.R. § 656.10(d)(3)(iv).

The record further demonstrates that the offered job of registered nurse qualifies as a Schedule A occupation. The company described the job's duties as follows: "Assess patient health problems and needs, develop, and implement nursing care plans, and maintain medical records. Administer nursing care to ill, injured, convalescent, or disabled patients. May advise patients on health maintenance and disease prevention or provide case management." Consistent with DOL's definition of the term "professional nurse" at 20 C.F.R. § 656.5(a)(3)(ii), the offered job's duties indicate that the position involves making clinical judgments, providing care and counsel to patients, administering medicines

and treatments, and promoting health and disease prevention. The offered job therefore qualifies for Schedule A designation as a professional nurse.

The Petitioner demonstrated its compliance with DOL's Schedule A labor certification application regulations. However, the Petitioner must also meet the skilled worker requirements.

B. Qualifications for the Offered Job

Meeting Schedule A labor certification requirements does not necessarily mean that the Beneficiary qualifies for the requested immigrant visa category. *See generally* 6 *USCIS Policy Manual* E.(7)(A), www.uscis.gov/policy-manual. The company must also meet USCIS regulations for skilled worker petitions. *See* 8 C.F.R. § 204.5. The Petitioner must demonstrate:

- Its ability to pay the offered job's proffered wage from the petition's filing date until the Beneficiary obtains permanent residence, *see* 8 C.F.R. § 204.5(g)(2);
- That the Beneficiary and the offered job qualify for the skilled worker classification, 8 C.F.R. § 204.5(l)(3)(ii)(B); and
- That the Beneficiary meets the offered job's requirements listed on the blanket labor certification application, *see id.*

6 *USCIS Policy Manual* E.(7)(B) n.5.

The Director noted that the Beneficiary's educational qualifications (a U.S. bachelor's degree) exceed the offered job's educational requirements (two years of post-secondary studies). But the Director found that the Petitioner did not demonstrate the Beneficiary's qualifying experience for the offered job. Specifically, the Director found that, at the time of the petition's filing, the company did not demonstrate the Beneficiary's possession of at least one year of experience in the job offered. *See* section 203(b)(3)(A)(i) of the Act (describing skilled workers as "[q]ualified immigrants who are capable, *at the time of petitioning for the classification under this paragraph*, of performing skilled labor (requiring at least 2 years training or experience)") (emphasis added); *see also* 8 C.F.R. § 103.2(b)(1) (requiring a petitioner to establish eligibility "at the time of filing the benefit request").

The Petitioner submitted a letter stating the Beneficiary's work at the Alabamian hospital as an advanced nurse extern from June 14, 2021 to August 6, 2021, or 54 days. The Petitioner also provided a letter stating that it employed her in the offered job from February 14, 2022 until the petition's filing on December 30, 2022, or 320 days. Thus, the letters appear to establish that, by the petition's filing, the Beneficiary gained nursing employment experience totaling 374 days, more than a 365-day year.

The Director, however, found that the hospital's letter did not demonstrate the Beneficiary's qualifying experience there in the offered job of registered nurse. The extern experience letter states that the Beneficiary worked at the hospital "[u]nder the direction of a Registered Nurse. . . . Duties and responsibilities are limited to those that fall under the scope of practice of unlicensed health care providers acting under the direction of a licensed nurse." Also, contrary to the Beneficiary's attestation on the labor certification application, the letter suggests that the hospital did not employ her on a full-time basis as an extern. The letter states that she worked "in a as needed status."

In finding insufficient evidence that the Beneficiary's hospital work as an extern constitutes qualifying experience in the job offered, the Director looked to the Petitioner's labor certification application form. The form states that the offered job requires experience "in the job offered." On a labor certification application form, the phrase "in the job offered" means experience performing the job duties listed on the labor certification application. *See, e.g., Matter of Symbioun Techs., Inc.*, 2010-PER-01422, *3 (BALCA Oct. 24, 2011).

On appeal and in its PWD request, the Petitioner indicates that the offered job requires one year of experience not "in the job offered," but in "nursing." The Petitioner, however, has not explained why its labor certification application specifies experience in the job offered while the company otherwise states the position's need for experience only in nursing. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies).

Also on appeal, the Petitioner states that the Beneficiary's extern work was "part of her formal nursing educational program." Thus, for labor certification purposes, the record demonstrates that her education included her extern work. Therefore, the Petitioner has not demonstrated that the work qualifies as separate employment experience. *See Matter of Avon Prods., Inc.*, 88-INA-348, 1989 WL 250441, *4 n.4 (BALCA July 27, 1989) (questioning whether a noncitizen's internship as part of a master's degree program "should even be counted as work experience and not simply as part of her education").

For the foregoing reasons, the Petitioner has not established that the offered job requires experience in nursing, as opposed to in the job offered. Thus, we agree with the Director that the offered position requires experience in the job offered and that the Petitioner did not demonstrate that the Beneficiary's extern work constitutes such experience.

The Director also found that the Petitioner could not rely on experience that the Beneficiary gained with the company. A labor certification employer cannot use experience that a noncitizen gained with it as qualifying experience unless they gained the experience in a substantially different job than the offered one or the employer can demonstrate the impracticality of training a U.S. worker for the offered job. *See* 20 C.F.R. § 656.17(i)(3). The Petitioner does not try to establish that the Beneficiary gained her experience with it in a substantially different job or that it would be impractical for the company to train a U.S. worker for the job. Rather, the company argues that, because its petition involves a Schedule A labor certification application, the regulation at 20 C.F.R. § 656.17(i)(3) does not apply to this matter. "Application for certification of employment as a professional nurse may be made only under this § 656.15(c) and not under § 656.17." 20 C.F.R. § 656.15(c)(2). The Petitioner therefore contends that it can rely on the experience the Beneficiary gained with it.

But we need not decide whether the Beneficiary's experience with the Petitioner counts as qualifying experience. Even if it does, the Beneficiary would lack the requisite one year of experience, as the company employed her only for about 10 months, from February 2022 until the petition's filing in December 2022. The record therefore supports the Director's finding of insufficient evidence of the Beneficiary's qualifying experience for the offered job.

On appeal, the Petitioner argues that the Director misapplied 8 C.F.R. § 204.5(l)(3)(ii)(B) by requiring the company to demonstrate the Beneficiary's possession of the offered job's minimum experience requirements as stated on the labor certification application. The regulation states:

> If the petition is for a skilled worker, the petition must be accompanied by evidence that the [noncitizen] meets the educational, training or experience, and any other requirements of the individual labor certification [or] meets the requirements for Schedule A designation . . . The minimum requirements for this classification are at least two years of training or experience.

8 C.F.R. § 204.5(l)(3)(ii)(B). The Petitioner did not submit an individual labor certification certified by DOL. Rather, it applied for Schedule A designation by submitting an uncertified individual labor certification. Thus, the company contends that, under the regulation, it need only show that the Beneficiary "meets the requirements for Schedule A designation." *See* 8 C.F.R. § 204.5(l)(3)(ii)(B).

In an attempt to support its regulatory interpretation, the Petitioner quotes former USCIS policy. The company notes that the Agency previously indicated that Schedule A petitioners need not demonstrate that their beneficiaries meet the exact job requirements listed on their labor certification applications. The prior guidance states:

> The "minimum requirements" in Schedule A cases as listed [in labor certification applications] may not be a true reflection of the actual education, training, and experience needed to perform the job. In many cases a Schedule A petitioner will give the particular [noncitizen]'s qualifications rather than actual minimum requirements, and, because the labor certification form is sent directly to USCIS, this will not be reviewed first by DOL and corrected through DOL involvement. This point is important because many classifications require that the petitioner establish that the position *requires* a person of a particular caliber. As long as the **duties** shown on the labor certification application are appropriate for a position that requires licensure as a registered nurse, . . . the petition should not be denied and a request for evidence need not be sent to confirm the precise minimum job requirements.

*Adjudicator's Field Manual* Chapter 22.2(b)(4)(C)(ii), https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1.html. (emphasis in original).

The USCIS Policy Manual, however, supersedes the Agency's prior guidance. The manual states: "The USCIS Policy Manual is the agency's centralized online repository for USCIS' immigrant policies. The Policy Manual is replacing the Adjudicator's Field Manual (AFM), the USCIS Immigration Policy Memoranda site, and other USCIS policy repositories." *See USCIS Policy Manual*, "About the Policy Manual," www.uscis.gov/policy-manual. As the Director found, the policy manual excludes the former guidance quoted by the Petitioner. Rather, as previously indicated, the manual indicates that adjudicators should require Schedule A beneficiaries to meet job requirements listed on accompanying labor certification applications. The manual states:

> The employer must also submit all other documentation required to show eligibility for the employment-based immigrant visa classification sought, such as evidence of its

> ability to pay, that the beneficiary and position qualify for the classification sought, *and that the beneficiary meets the job requirements of the blanket labor certification.*

6 *USCIS Policy Manual* E.(7)(B) n.5 (emphasis added). Additionally, the language quoted above from the *Adjudicator's Field Manual* spoke to a job's minimum qualifications, not whether a beneficiary met them.

The Petitioner acknowledges the policy manual's replacement of prior USCIS guidance. But the company argues that "the purpose of the Schedule A application process remains the same: that DOL has predetermined there are not sufficient U.S. workers who are able, willing, qualified, and available pursuant to regulation." In light of the current guidance in the USCIS Policy Manual, however, the Petitioner's argument does not persuade us.

Also, the company's regulatory interpretation of 8 C.F.R. § 204.5(l)(3)(ii)(B) would conflict with the Act. Under the Petitioner's reading, the regulation would prevent USCIS from determining whether the Beneficiary and the offered job qualify for skilled worker classification. *See* section 203(b)(3)(A)(i) of the Act (describing skilled workers as "capable . . . of performing skilled labor (requiring at least 2 years training or experience"). Instead, we read 8 C.F.R. § 204.5(l)(3)(ii)(B), consistent with the Act, to require the Petitioner's demonstration of the job's eligibility for skilled-worker classification and the Beneficiary's qualifications for the offered job as listed on the labor certification application.

The Petitioner also argues that the Beneficiary's amount of post-secondary education demonstrates her qualifications as a skilled worker. The company notes that the regulatory definition of "skilled worker" states that "[r]elevant post-secondary education may be considered as training for the purposes of this provision." 8 C.F.R. § 204.5(l)(2). As previously indicated, the Beneficiary completed two more years of university nursing studies than the offered job requires. The Petitioner therefore states that USCIS should consider her two additional years of relevant post-secondary education as two years of training.[3]

We recognize that a skilled worker petition can use a beneficiary's relevant post-secondary education as training. But a petitioner still must demonstrate that a beneficiary meets the offered job's minimum requirements as listed on a Schedule A labor certification application. Even if we considered the Beneficiary's additional education as training, she would still not satisfy the offered job's minimum experience requirements as listed on the labor certification application.

The Petitioner further argues that we should consider experience the Beneficiary gained after the petition's filing. The provisions of 20 C.F.R. § 656.17 do not govern Schedule A proceedings. *See, e.g.,* 20 C.F.R. § 656.15(c)(2). Under that section, a noncitizen who already works for a labor certification employer generally must have been qualified for the offered job "at the time of hiring by the employer." 20 C.F.R. § 656.17(i)(3). The Petitioner therefore contends that 20 C.F.R.

[3] Relying on a regulation governing H-1B nonimmigrant visas, the Petitioner also argues that the Beneficiary's two additional years of education should count as six years of training. Under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of training or experience constitute one year of college or university study for purposes of determining equivalencies to U.S. bachelor's degrees. The cited regulation, however, applies only to H-1B visa petitions. We therefore decline to apply it in these immigrant visa petition proceedings.

§ 656.17(i)(3) does not apply to its Schedule A labor certification application and that the company need not demonstrate the Beneficiary's eligibility for the offered job at the time of the petition's filing or earlier.

But, as previously indicated, the Act and a USCIS regulation require the Petitioner to demonstrate the Beneficiary's qualifications for the offered job at the time of the petition's filing. *See* section 203(b)(3)(A)(i) of the Act; 8 C.F.R. § 103.2(b)(1). Thus, the Beneficiary clearly had to qualify for the offered job by the petition's filing.

Finally, the Petitioner asks us to treat the one-year experience requirement on the labor certification application as a "scrivener's error." The company submitted an amended application form, deleting the one-year experience requirement.

USCIS may excuse typographical errors that are clearly inadvertent. *See Matter of Zaidan*, 19 I&N Dec. 297, 298 n.1 (BIA 1985) (excusing a regulation's incorrect reference to another provision). The Petitioner, however, has not established that it inadvertently listed the one-year experience requirement on its labor certification application. The record indicates that, about nine months before the application's filing, the company submitted its PWD request, which also states that the offered job requires one year of experience.[4] A preponderance of the evidence therefore indicates that the offered job truly requires one year of experience. We therefore decline to excuse the claimed scrivener's error.

## III. CONCLUSION

The Petitioner has not demonstrated the Beneficiary's qualifying experience for the offered job. We will therefore affirm the petition's denial.

**ORDER:** The appeal is dismissed.

[4] As previously indicated, unlike the Petitioner's labor certification application, the company's PWD request requires one year of experience in "nursing," rather than "in the job offered."