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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 1 6 2010

SRC 06 176 50899

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner operates a nursing school, and seeks to employ the beneficiary permanently in the United States as a nursing instructor pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the Department of Labor (DOL) has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed. Schedule A, Group I includes aliens who will be employed as professional nurses; and (i) who have received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); (ii) who hold a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or (iii) who have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing. 20 C.F.R. § 656.5(a)(2).[1]

Based on 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file Form I-140, "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program."[2] The priority date of any petition filed for classification under section 203(b) of the Act "shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [U.S. Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer's completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d).

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[1] The beneficiary received her CGFNS Certificate on September 16, 2005, and she has a bachelor of science degree in nursing.

[2] On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

The Texas Service Center director denied the petition on May 11, 2007, because the job offered is not designated as a Schedule A, Group I occupation.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 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. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

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.

On the ETA Form 9089, the "job offer" position description for a nursing instructor (O*Net Code 25-1072.00) reflects the following requirements:

H.4. Education: Minimum level required: Bachelor's.

4-B. Major Field Study: Nursing.

6. Is experience in the job offered required for the job?

The petitioner checked "no" to this question.

7. Is there an alternate field of study that is acceptable?

The petitioner checked "no" to this question.

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "no" to this question.

9. Is a foreign educational equivalent acceptable?

The petitioner listed "yes" that a foreign educational equivalent would be accepted.

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[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 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).

11. Job duties: The position will provide general nursing instruction to students. Duties will include: (1) demonstrating and teaching patient care in the classroom and clinical units to nursing students; (2) teaching basic science courses and advanced clinical courses; (3) demonstrating procedures to nursing students; and (4) instructing students in taking vital signs, administering medications, and observing patient abnormalities to assess conditions. The nursing instructor may serve in various clinical settings as part of the teaching regimen.

14. Specific skills or other requirements: N/A.

On appeal, counsel asserts that the regulation at 20 C.F.R. § 656.3,[4] which defines professional nurse as a Schedule A, Group I occupation, includes the proffered job of nurse instructor. He asserts that the Dictionary of Occupational Titles (DOT) specifically lists nurse instructor as an occupation included under Occupational Group No. 075 (Registered Nurses) as specified in 20 C.F.R. § 656.3. We agree that the DOT includes the position of nurse instructor under Occupational Group No. 075.[5]

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[4] 20 C.F.R. § 656.3 states:

> Professional nurses means persons who apply the art and science and nursing, which reflects comprehension of principles derived from the physical, biological, and behavioral sciences. Professional nursing generally includes the making of clinical judgments concerning the observation, care, and counsel of persons requiring nursing care; and administering of medicines and treatments prescribed by the physician or dentist; the participation in activities for the promotion of health and the 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. This definition includes only those occupations within Occupational Group No. 075 of the Dictionary of Occupational Title (4th ed.).

[5] DOT Occupational Group No. 075 includes occupations concerned with administering nursing care to the ill or injured. It includes nursing administration and instruction. http://www.occupationalinfo.org/defset1_7254.html (accessed March 3, 2010). DOT Code 075.124-018 for the position of nurse instructor lists the following job description:

> Demonstrates and teaches patient care in classroom and clinical units to nursing students and instructs students in principles and application of physical, biological, and psychological subjects related to nursing: Lectures to students, conducts and supervises laboratory work, issues assignments, and directs seminars and panels. Supervises student nurses and demonstrates patient care in clinical units of hospital. Prepares and administers examinations, evaluates student progress, and maintains records of student classroom and clinical experience. Participates in planning curriculum, teaching schedule, and course outline. Cooperates with medical and nursing personnel in evaluating and improving teaching and nursing practices. May specialize in specific subject, such as anatomy, chemistry, psychology, or nutrition, or in type of nursing activity, such as nursing of medical or surgical patients. May conduct classes for patients in health practices and procedures.

However, counsel cites a pre-PERM regulation in support of his assertion that a nurse instructor is a Schedule A, Group I occupation. The PERM regulations became effective on March 28, 2005, and apply to the instant case, which was filed on May 12, 2006. Professional nurse is defined under the PERM regulations at 20 C.F.R. § 656.5(a)(3)(ii):

> 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.

The PERM regulation at 20 C.F.R. § 656.5 defining professional nurse removed the last sentence from the pre-PERM regulation at 20 C.F.R. § 656.3 defining professional nurse, which included the reference to Occupational Group No. 075 (Registered Nurses) of the DOT. However, the remaining portion of the definition of professional nurse is essentially the same. The proffered job of nurse instructor involves the application of the art and science of nursing, which reflects comprehension of principles derived from the physical, biological and behavioral sciences. The proffered job of nurse instructor involves making clinical judgments involving the observation, care and counsel of persons requiring nursing care; administering of medicines and treatments; and participation in the activities for the promotion of health and prevention of illness in others. These duties are all performed concurrently with the instruction of nursing students. Thus, the proffered job of nurse instructor is a Schedule A, Group I occupation, as it fits within the definition of professional nurse under 20 C.F.R. § 656.5.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.[6]

ORDER: The appeal is sustained. The petition is approved.

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http://www.occupationalinfo.org/07/075124018.html (accessed March 10, 2010).

[6] On December 7, 2009, the AAO sent the petitioner a Request for Evidence (RFE) requesting additional evidence of its continuing ability to pay the proffered wage. The petitioner has established its continuing ability to pay the proffered wage.