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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

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[REDACTED]

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Date: **MAY 03 2011** Office: TEXAS SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Kieran S. Porlitz for

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner operates as a healthcare services company, and seeks to employ the beneficiary permanently in the United States as a professional nurse 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 regulation at 8 C.F.R. § 204.5(l)(2), and section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii).

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 United States 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.

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."¹ 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 [United States Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d). The priority date of the instant petition is July 27, 2007.

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

¹ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA Form 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new ETA Form 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).

Employment Certification to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d). The petitioner must also obtain a prevailing wage determination (PWD) in compliance with 20 C.F.R. § 656.40 and § 656.41. Also, according to 20 C.F.R. § 656.5(a)(2), aliens who will be permanently employed as professional nurses must (1) have received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS), (2) hold a permanent, full and unrestricted license to practice professional nursing in the state of intended employment, or (3) have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing.

The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position of a professional nurse and that the petitioner had failed to submit a PWD with the petition. The director denied the petition accordingly.

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

As set forth in the director's June 4, 2009 denial, the issues in this case are (1) whether or not the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position, and (2) whether or not the petitioner submitted a PWD with the petition.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. 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 of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, 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).

In this case, the ETA Form 9089 indicates in Part H that the proffered position requires a bachelor's degree in nursing or foreign equivalent, knowledge in the use and operation of equipments normally handled by a nurse, proficiency in the English language, and passage of the NCLEX-RN examination or possession of a CGFNS certificate. The posting notice submitted with the petition indicates that the position requires a bachelor's degree in nursing and passage of the NCLEX-RN

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 the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

examination.³ The ETA Form 9089 also indicates in Part I.a.1. that certification is sought for a professional occupation.⁴

On Part 2.e. of the Form I-140, the petitioner indicates that it is filing the petition for a professional or skilled worker. The record reflects that the beneficiary holds an associate's degree in nursing, and holds a permanent, full and unrestricted license to practice professional nursing in New Jersey, the state of intended employment. The petitioner has submitted no evidence to establish that the beneficiary holds a bachelor's degree in nursing, or that she has passed the NCLEX-RN examination or possesses a CGFNS certificate, as required by the ETA Form 9089.⁵

On appeal, counsel for the petitioner asserts that the petitioner does not require a minimum of a bachelor's degree for the position of a professional nurse, and that his office erroneously checked the box indicating that a bachelor's degree is the minimum level required for the offered position. Counsel submits an amended page of the Form ETA 9089 indicating that an associate's degree is the minimum level of education required for the position of professional nurse. However, the petitioner may not change the job requirements on appeal. 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).

Counsel also submits an amended posting notice on appeal indicating that a "degree in nursing" is the minimum level of education required for the position of professional nurse. The petitioner is required to post the position in accordance with 20 C.F.R. § 656.10(d), which provides:

- (1) In applications filed under § 656.15 (Schedule A), § 656.16 (Shepherders), § 656.17 (Basic Process); § 656.18 (College and University Teachers), and § 656.21 (Supervised Recruitment), the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the certifying officer as follows:
 - (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment. Documentation may consist of a copy of the

³ The posting notice includes an attestation dated July 25, 2007, signed by [REDACTED] certifying that the posting notice was posted from May 1, 2007 to May 17, 2007, at the petitioner's office in Lakewood, NJ. The amended posting notice submitted by counsel on appeal does not contain a similar attestation from the petitioner.

⁴ The ETA Form 9089 states at Part I.a.1. that professional occupations "are those for which a bachelor's degree (or equivalent) is normally required."

⁵ 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)).

letter and a copy of the Application for Permanent Employment Certification form that was sent to the bargaining representative.

(ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include locations in the immediate vicinity of the wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a). In addition, the employer must publish the notice 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. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

As previously noted, the posting notice submitted with the petition indicates that the position requires a bachelor's degree in nursing and passage of the NCLEX-RN examination. The posting notice does not indicate whether the petitioner published the notice 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 petitioner's organization. Further, the petitioner has not provided copies of all the in-house media, whether electronic or print, that was used to distribute notice of the application in accordance with the procedures used for similar positions within the petitioner's organization. Therefore, the petitioner did not meet the regulatory requirements for posting notices as set forth in 20 C.F.R. § 656.10(d) with its original posting notice, and the notice contradicts counsel's claim that the proffered position does not require a bachelor's degree. The notice clearly states that a bachelor's degree in nursing is a requirement for the position.

On appeal, counsel submits an amended posting notice. Counsel asserts that the petitioner posted a correct posting notice at its office from May 1, 2007 to May 17, 2007, specifying that the job opportunity required an associate's degree and passage of the NCLEX-RN examination. The amended notice states that the proffered position requires a "degree in nursing" and passage of the NCLEX-RN. The amended notice does not indicate where it was posted, and it does not indicate whether the petitioner published the notice 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 petitioner's organization. Further, the petitioner has not provided copies of all the in-house media, whether electronic or print, that was used to distribute notice of the application in accordance with

the procedures used for similar positions within the petitioner's organization. Therefore, the petitioner did not meet the regulatory requirements for posting notices as set forth in 20 C.F.R. § 656.10(d) with its amended posting notice.

In sum, regarding the position's requirements, the ETA Form 9089 filed with the petition indicates that the proffered position requires a bachelor's degree in nursing or foreign equivalent, knowledge in the use and operation of equipments normally handled by a nurse, proficiency in the English language, and passage of the NCLEX-RN examination or possession of a CGFNS certificate. The beneficiary does not have a bachelor's degree in nursing, and, thus, does not meet the educational requirements of the labor certification application.⁶ Further, the petitioner has not established that the beneficiary has passed the NCLEX-RN examination or possesses a CGFNS certificate, as required by the ETA Form 9089. Therefore, the director's decision to deny the petition on the basis that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position of a professional nurse is affirmed.

The director also determined that the petitioner had failed to submit a PWD with the petition. The regulation at 20 C.F.R. § 656.15(b) requires an Application for Permanent Employment Certification form for Schedule A to include a PWD in accordance with § 656.40 and § 656.41. With the petition, the petitioner submitted an excerpt from the Foreign Labor Certification Online Wage Library (www.flcdatacenter.com).⁷ With the petition, the petitioner did not submit a PWD from the SWA having jurisdiction over the proposed area of intended employment.

In support of the appeal, counsel submits a PWD with a determination date of July 26, 2007, issued by the New Jersey Department of Labor and Workforce Development, Alien Labor Certification Unit (NJALCU). Counsel asserts that the PWD was provided at the time the Form I-140 was filed. The PWD submitted on appeal indicates that the petitioner's counsel received it by fax from the NJALCU on July 30, 2007, three days after the Form I-140 petition was filed. Therefore, the PWD could not have been filed with the instant petition as counsel claims.⁸ Thus, the director's decision

⁶ While counsel is correct that registered nurses may be considered under the skilled worker and/or professional categories, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. In the instant case, the labor certification application submitted with the Form I-140 states that the proffered job requires a bachelor's degree in nursing, knowledge in the use and operation of equipments normally handled by a nurse, proficiency in the English language, and passage of the NCLEX-RN examination or possession of a CGFNS certificate. The petitioner has not established that the beneficiary possesses a bachelor's degree in nursing, or that she has passed the NCLEX-RN examination or possesses a CGFNS certificate. Therefore, she does not meet the requirements of the labor certification application.

⁷ The regulation at 20 C.F.R. § 656.40(a) states that the employer must request a PWD from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer.

⁸ *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

to deny the petition on the basis that the petitioner failed to submit a PWD with the petition is affirmed.

Beyond the decision of the director, the petitioner has failed to establish its ability to pay the beneficiary the proffered wage.⁹ The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. *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 supplied.]

In this case, the petitioner claims to employ 185 employees, but has failed to provide a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage, or any other form of regulatory prescribed evidence to establish its continuing ability to pay the proffered wage.¹⁰ Therefore, the petitioner has also failed to establish its continuing ability to pay the beneficiary the proffered wage from the priority date.

Furthermore, USCIS records indicate that the petitioner has filed at least three petitions since the petitioner's establishment in 1999, including one I-129 petition, and two additional I-140 petitions. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

⁹ 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).

¹⁰ The only documentation submitted regarding the petitioner's ability to pay is a letter dated July 25, 2007 from [REDACTED], the petitioner's [REDACTED], stating that the petitioner "...has grown to a size of 185 employees and gross annual revenue of \$7.3 million..." Without further evidence, the AAO concludes that [REDACTED] does not qualify as the petitioner's financial officer, pursuant to 8 C.F.R. 204.5(g)(2), and therefore, the letter from her will not be accepted as evidence of the petitioner's ability to pay the proffered wage.

prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

In addition, the posting notice submitted by the petitioner with the petition, and the amended posting notice submitted by counsel on appeal, do not meet the requirements for posted notices to the petitioner's employees as set forth at 20 C.F.R. § 656.10(d)(3)(iii). 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:

- (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.

With the petition, the petitioner submitted a Notice of Job Opportunity signed by [REDACTED] on July 25, 2007 indicating that a notice of filing an application for permanent employment certification was posted from May 1, 2007 to May 17, 2007 at the petitioning company's office and the place of employment. While the notice was posted for the required ten consecutive business days, it did not provide the proper address of the appropriate Certifying Officer as required by 20 C.F.R. § 656.10(d)(3)(iii). The amended notice of posting submitted on appeal also failed to provide the proper address of the appropriate Certifying Officer as required by 20 C.F.R. § 656.10(d)(3)(iii). For employment in New Jersey, the proper address of the appropriate Certifying Officer¹¹ is:

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

This office finds that the posting notices do not meet the requirements for posted notices to the petitioner's employees as set forth at 20 C.F.R. § 656.10(d)(3)(iii).

Finally, we note that the posting notice submitted with the petition and the amended posting notice submitted on appeal indicate that the job opportunity is 30 hours per week.¹² The job offer must be

¹¹ *See* http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_3-3-05.pdf (accessed April 26, 2011).

¹² DOL precedent establishes that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). It is unclear from the record of proceeding whether the job offered is for full-time employment.

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.