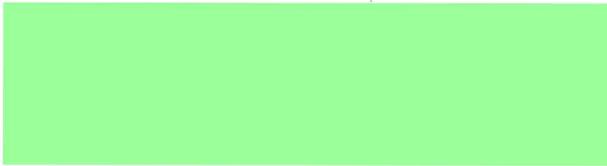


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



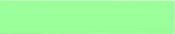
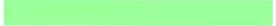
U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **JAN 18 2013**

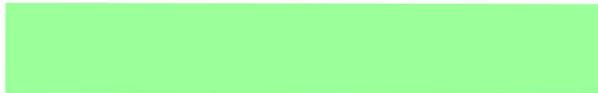
Office: TEXAS SERVICE CENTER

FILE: 


IN RE:

Petitioner:

Beneficiary:



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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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 The decision of the director will be withdrawn and the matter remanded for a new decision.

The petitioner is a hospital. It seeks to employ the beneficiary permanently in the United States as a Utilization Reviewer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary satisfied the minimum level of experience stated on the Form ETA 750. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely. 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (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 are members of the professions.

The Form ETA 750 in this matter is certified by the DOL. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

(b)(6)

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: “The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.” *Tongatapu*, 736 F. 2d at 1309.

The required education, training, experience and special requirements for the offered position are set forth at Part A, Items 14 and 15, of Form ETA 750. In the instant case, the labor certification states that the position has the following minimum requirements:

Block 14:

Education: Bachelor’s degree in Nursing or related field.

Experience: 2 years in the job offered.

Block 15: None.

The AAO notes that the beneficiary in this matter has a bachelor’s degree in Nursing from [REDACTED] in the Philippines. At issue is whether the beneficiary has the required 2 years of experience in the job offered.

On June 14, 2008, the director requested the the petitioner submit documentary evidence in the form of current or former employer(s)’ letters attesting to the beneficiary’s experience in the specific occupation of utilization reviewer. The petitioner responded with an “Experience Certificate” issued to the beneficiary by the [REDACTED]. The “Experience Certificate” listed the beneficiary’s dates of employment and job title. However, no duties were listed. Thus, the director denied the petition because the beneficiary did not substantiate the 2 years of experience in the job offered.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine “the language of the labor certification job requirements” in

order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. See *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. See *id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

On appeal, counsel submits an employment experience letter from the Republic of the Philippines, Department of Health, Center for Health Development No. 3. The letter was signed by [REDACTED] Chief Nurse, and [REDACTED] Chief Administrative Officer. The affiants state that the beneficiary was employed as a Head Nurse/Coordinator from January 1980 to December 1984.

The employment experience letter contains a detailed list of the beneficiary's duties. The duties will be compared to the job duties listed on the Form ETA 750.

Duties listed on Form ETA 750

Duties performed for the Republic of the Philippines, Department of Health

Reviews and evaluates patients' medical records to determine specific needs, care plan, and length of stay in the hospital applying utilization review criteria to meet the regulatory requirements of Federal, State, and health systems.

Reviews and evaluates patients' medical records to determine specific needs, care plan, and length of stay in the hospital, applying utilization review criteria to meet the regulatory requirement of the Department of Health and other government agencies health system.

Reviews medical data such as interim orders, laboratory results, progress notes, and status reports for completion and accuracy to ensure that treatment provided consistently reflects the individual needs of the patients.

Reviews medical data such as interim orders, laboratory results, progress notes and status reports for completion and accuracy to ensure that treatment provided consistently reflects the individual needs of the patients.

Coordinates with medical staff about on-going cases.

Performs initial assessments and reviews of medical records of newly admitted patients in order to assess their needs.

In this case, the duties listed in the employment experience letter are sufficiently similar to the job duties listed on the Form ETA 750. Thus, the petitioner has demonstrated that the beneficiary had 2 years of experience in the job offered and is qualified to perform the duties of the proffered position.

However, the petition may not be approved because it has not been established that the petition is accompanied by a labor certification which pertains to the offered position. 8 C.F.R. § 204.5(l)(3)(i). A labor certification is valid only for the particular job opportunity and the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(c)(2). In this matter, the Form ETA 750 was filed by an entity called [REDACTED] FEIN [REDACTED]. However, the Form I-140 was filed by a business organization called [REDACTED] LLC, FEIN [REDACTED]. These are two different employers having two different federal employer identification numbers. *See* 20 C.F.R. § 656.3. Accordingly, the petition is not accompanied by a labor certification which is valid for the offered position. The offered position is for a different job opportunity with a completely different employer. For this reason, the petition may not be approved at this time.

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 not met that burden.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.