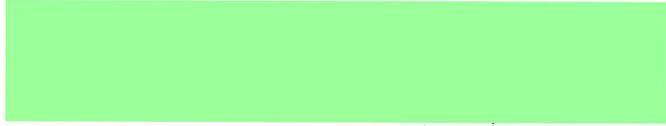


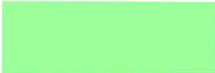


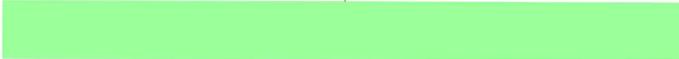
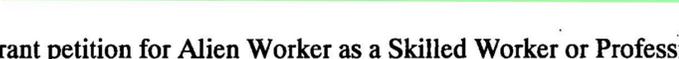
U.S. Citizenship
and Immigration
Services

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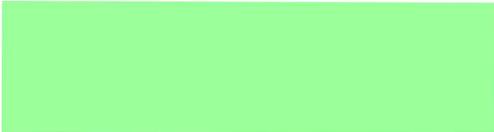
Date: **MAR 08 2013** Office: TEXAS SERVICE CENTER

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:

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen/reconsider. The motion to reopen will be granted. 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).

The director denied the petition after determining that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position, which requires a bachelor's degree in nursing; and, that the petitioner had failed to submit a Prevailing Wage Determination (PWD) with the petition. The petitioner appealed, and the AAO dismissed the appeal on May 3, 2011. In dismissing the appeal, the AAO upheld the director's decision for the reasons stated by the director in his denial. Beyond the decision of the director, the AAO also dismissed the appeal because the petitioner failed to establish that the beneficiary had either passed the NCLEX-RN examination or that she possesses a CGFNS certificate as required by the ETA Form 9089; the petitioner failed to establish its ability to pay the beneficiary the prevailing wage; and, the posting notice and an amended posting notice did not meet the requirements for notice to the petitioner's employees.

On motion to reopen/reconsider, counsel asserts that the petitioner has submitted sufficient evidence to demonstrate eligibility for the benefit sought. Counsel submits a brief and additional evidence.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3). In addition, a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The record shows that the motion to reopen/reconsider is properly filed, timely and states new facts and reasons for reconsideration. Thus the motion will be granted. Upon review, however, the appeal will be dismissed. 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.

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 must 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 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 petitioner established that the beneficiary has a license to practice professional nursing in the State of New Jersey as of the priority date and is in compliance with the regulation at 20 C.F.R. § 656.5(a)(2).

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).

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 our May 3, 2011 dismissal, the remaining issues in this case are (1) whether the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position, (2) whether the petitioner submitted a PWD with the petition, (3) whether the petitioner has established its ability to pay the beneficiary the prevailing wage; and, (4) whether the posting notice and the amended posting notice met the requirements for notice to the petitioner's employees.

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 equipment 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 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. However, the petitioner has submitted no evidence to establish that the beneficiary holds a bachelor's degree in nursing.

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).

³ The posting notice includes an attestation dated July 25, 2007, signed by [REDACTED] Director of Nursing, 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 contains the identical 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."

On motion, counsel for the petitioner reasserts that the petitioner does not require a minimum of a bachelor's degree for the position, and that his office erroneously checked the box indicating that a bachelor's degree is the minimum level required for the offered position. Counsel resubmits 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. Counsel contends, on motion, that the change to the petition is not material, and therefore, the 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 is permitted. However, as we discussed in the decision dismissing the appeal, 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 asserts that the applicant has a dual bachelor's degree in Biology and nursing. In support counsel submits a March 14, 2010, Academic Equivalency Evaluation from [REDACTED] Associate Professor of Radiation Oncology and Internal Medicine at [REDACTED] stating that the applicant's bachelor's degree in Biology and her associate's in Applied Science (Nursing) combined is the equivalent of having a bachelor of science degree with a dual major in Nursing and in Biology. However, [REDACTED] does not indicate how the courses completed by the applicant are equivalent to the course requirements for a Bachelor of Science in nursing. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). See also *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony). The evaluation does not indicate that the degree equivalency would be acceptable to the New Jersey Board of Nursing as a four-year nursing degree nor does the Form ETA 9089 indicate that an alternative level of education, or a foreign equivalent degree in a field other than nursing, would be acceptable.

Counsel contends that as the position requires only an Associate Degree, the Form ETA 9089 is consistent with the position because it indicates that the beneficiary is qualified for the position as she has an Associate's Degree in nursing. However, in determining whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the job on the labor certification. 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. We reiterate that 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. A petitioner cannot avoid the record it has created by simply claiming error. Thus, the beneficiary is not qualified for the position as she does not have a bachelor's degree in nursing.⁵

⁵ 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

We note that the record includes a copy of a Registered Professional Nurse License issued by the State of New Jersey, Division of Consumer Affairs, indicating that the beneficiary is a licensed Registered Nurse.⁶ On motion, counsel states that as the New Jersey Board of Nursing requires successful completion of the NCLEX-RN for licensure, the record establishes that the beneficiary has passed the NCLEX-RN examination required by the ETA Form 9089. The AAO disagrees. The Board of Nursing website for New Jersey (www.state.nj.us/lps/ca/nursing) (accessed /25/13) indicates that Licensure by Examination requires that the beneficiary have taken the NCLEX examination. However, the website also indicates that licensure by endorsement does not require passage of the NCLEX examination. The record does not indicate the kind of licensure application the beneficiary submitted. The record does not indicate that the beneficiary has passed the NCLEX examination or that she has the CGFNS certificate as of the date of filing the petition. Thus, the beneficiary is not qualified under the requirements of the labor certification and the petition must be denied.

In the AAO decision dismissing the appeal, we noted that 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).

Counsel reasserts, on motion, that the amended posting notice submitted on appeal indicates that a "degree in nursing" is the minimum level of education required for the position and that the amended notice was posted within the allowable time.

As previously noted by the AAO, both the initial and the amended notices are deficient in that the posting notices do 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. However, the record does not include additional evidence. 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. Further, it appears as if both notices were published simultaneously from May 1-17, 2007, one requiring a bachelor's degree in nursing and the second requiring a degree in nursing. The petitioner presented both in connection with the current proceeding. Thus it is unclear whether the petitioner requires a bachelor's degree or a degree in nursing for the current position. The petitioner does not indicate

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 equipment 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.

⁶ The license indicates that it is valid from February 27, 2007 to May 31, 2009. It was valid on July 27, 2007, the filing date of the Form I-140.

that it posted for more than one position. When it submitted the amended notice the petitioner said it “consistently requires an associate’s degree” but does not explain why in this instance it also posted for a bachelor’s degree. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence).

On motion, counsel asserts that the amended posting notice complies with the provisions of 20 C.F.R. § 656.10(d)(iii). He contends that the proper address for the Certifying Officer for Schedule A cases is the State New Jersey Department of Labor, P.O. Box 053, Trenton, NJ 08625.

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.

As discussed in the AAO decision, dated May 3, 2011, 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).

Contrary to counsel’s contention, when PERM was implemented in March 2005,⁷ the application filing structure was changed. For employment in New Jersey, the proper address of the appropriate Certifying Officer 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

⁷ 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).

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). For this additional reason the petition must be denied.

In our dismissal we also upheld the director's decision to deny the petition because 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.

On motion, counsel asserts that at the time of filing the Form I-140 petition on June 27, 2007, a valid PWD with a determination date of July 26, 2007, and valid up to June 30, 2008, had been issued by the New Jersey Department of Labor and Workforce Development, Alien Labor Certification Unit (NJALCU). Counsel admits that the PWD was not included in the initial documentation but that because the PWD was issued prior to the filing date, that it is valid. As noted previously, the documentation requirements for a schedule A application include the submission of a PWD. 20 C.F.R. § 656.15(b)(1). Thus, we will not disturb our decision to dismiss the appeal on the additional basis that the petitioner failed to submit a PWD with the petition.

Finally, we noted that the posting notice submitted with the petition and the amended posting notice submitted on appeal both indicate that the job opportunity is 30 hours per week.⁸ The job offer must be for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10). On motion, the petitioner submits a June 1, 2009 letter from [REDACTED] Director of Nursing, stating that the beneficiary is employed full-time. However, Director [REDACTED] does not indicate the number of hours per week. It is still unclear from the record of proceeding whether the job offered is for full-time employment. For this additional reason the petition must be denied.

Upon review of the evidence submitted on motion, the petitioner has established its ability to pay the beneficiary the proffered wage.

Upon review and consideration of the motions to reopen and reconsider, 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.

⁸ 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).