



**U.S. Citizenship
and Immigration
Services**

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

MATTER OF T-H-C-, INC.

DATE: APR. 18, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a home healthcare agency, seeks to employ the Beneficiary as a registered nurse. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) § 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status who holds a baccalaureate degree and is a member of the professions.

The Director, Texas Service Center, denied the petition. The Director concluded that the minimum requirements of the offered position were less than a bachelor's degree and that the position did not qualify for professional classification.

The matter is now before us on appeal. On appeal, the Petitioner states that the Director incorrectly concluded that the Beneficiary is not fully qualified for the benefit sought. The Petitioner also states that the Director erred in concluding that the position offered was not eligible for classification as a professional. Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

The petition is for a Schedule A occupation. A Schedule A occupation is an occupation codified at 20 § C.F.R. 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.*

Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified ETA Form 9089. *See* 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i); *see also* 20 C.F.R. § 656.15.

If the Schedule A occupation is a professional nurse, a petitioner must establish that the beneficiary has a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); a

permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). *See* 20 C.F.R. § 656.5(a)(2).

We note that the Director did not conclude that the Beneficiary was not qualified for the instant position, as stated by the Petitioner. The Director stated, “The issue here is not whether the beneficiary qualifies for the position offered but whether the position is eligible for the initially selected classification as a professional.”

The regulation at 8 C.F.R. § 204.5(l)(3)(i) refers to the “professional worker” category and states that “[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application ... must demonstrate that the job requires the minimum of a baccalaureate degree.”

On the ETA Form 9089, both the primary and the alternative requirements listed in Part H constitute the minimum requirements for the position offered. In determining whether the position offered qualifies for classification as a professional position, USCIS must ensure that both the primary and alternate requirements of the offered position meet the requirements for professional classification.

In this case, the Petitioner submitted an uncertified ETA Form 9089 to USCIS with the Form I-140 as required for Schedule A occupations. Part H.4 of the ETA Form 9089 states that an Associate’s degree in Nursing was the minimum requirement for the position offered. Part H.14 further states as specific skills or other requirements that an “Associate or Bachelor’s degree in Nursing and valid Texas Nursing License” is required. This demonstrates that the *position* offered does not meet the requirement of 8 C.F.R. § 204.5(l)(3)(i) for professional classification because the job offer portion of the Schedule A application indicates that an associate’s degree, less than a bachelor’s degree, is an acceptable minimum requirement for the position offered.

We note that the Director issued a request for evidence on April 15, 2015, indicating that the Petitioner had selected the “professional” classification on the petition but that the evidence submitted supported the “skilled worker” classification. Accordingly, the Director provided the Petitioner an opportunity to clarify which classification it sought. In response, the Petitioner submitted a corrected page two of the uncertified ETA Form 9089 to amend Part H.4, indicating that a Bachelor’s degree in Nursing was the minimum requirement for the position offered.¹ The Petitioner did not submit any evidence demonstrating that the corrected ETA Form 9089 was reviewed and signed. *See* 8 C.F.R. § 204.5(l)(3)(i) (To apply for Schedule A designation ... a fully executed uncertified [ETA Form 9089] in duplicate must accompany the petition). Further, Part H.14 on page three was not amended and still indicates an Associate’s or Bachelor’s degree in Nursing as the minimum requirement.

¹ We note that the Director gave the Petitioner an opportunity to request classification under the skilled worker category not to amend the ETA Form 9089.

II. CONCLUSION

For the foregoing reasons, we conclude that the Petitioner has not established that the position offered meets the requirements for classification under the professional category.

Although not a basis for this decision, we note that the record does not contain any evidence of the Petitioner's ability to pay the proffered wage to the Beneficiary from the priority date of September 25, 2014, onward. The Petitioner must submit evidence of its ability to pay the proffered wage as of the priority date with any further filings.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of T-H-C-, Inc.*, ID# 16991 (AAO Apr. 18, 2016)