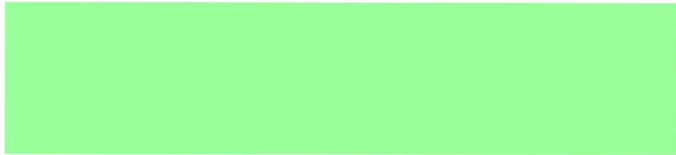




U.S. Citizenship  
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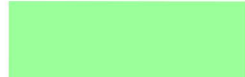
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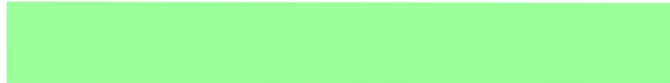
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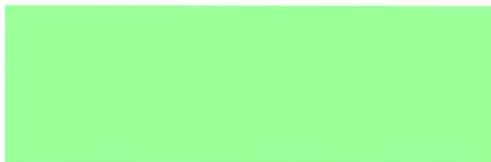
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:




INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner describes itself as a medical clinic. It seeks to permanently employ the beneficiary in the United States as a registered nurse. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is for a Schedule A occupation.<sup>1</sup> The priority date of the labor certification is August 12, 2014, the date on which the completed, signed Form I-140 immigrant petition was filed with USCIS. 8 C.F.R. § 204.5(d) and 20 C.F.R. § 656.30(a)(1). The director denied the petition because the petitioner failed to establish its ability to pay the proffered wage from the priority date onwards.

The record shows that the appeal is properly filed, timely and makes a specific 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.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

#### **Ability to Pay**

The regulation at 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

<sup>1</sup> 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 the 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.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The proffered wage as stated on the ETA Form 9089 is \$104,000.00 per year. The evidence in the record of proceeding shows that the petitioner is structured as sole proprietorship. On the petition, the petitioner claimed to have been established in [REDACTED] have \$540,637.00 in gross income and to currently employ 3 workers. On the ETA Form 9089, signed by the beneficiary on July 27, 2014, the beneficiary does not claim to have worked for the petitioner.

The regulation at 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. The record of proceeding does not contain the regulatory required evidence of the petitioner's ability to pay the proffered wage in 2014.<sup>3</sup> Pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner did not submit annual reports, federal tax returns, or audited financial statements establishing that it had the continuing ability to pay the proffered wage as of the August 12, 2014 priority date. Without the regulatory required evidence, we are unable to accurately assess the petitioner's ability to pay the proffered wage. Therefore, the petitioner has failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

### ***Bona Fide Job Opportunity***

Beyond the decision of the director,<sup>4</sup> we find that there was no *bona fide* job offer at the time the Form I-140 was filed.

Under 20 C.F.R. § 626.20(c)(8) and §656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986); and *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987).

In response to our December 23, 2014 notice of intent to deny and request for evidence (NOID/RFE) the petitioner stated that [REDACTED] was incorporated as [REDACTED] [REDACTED] on March [REDACTED] and is the successor-in-interest to the petitioner. In support of these statements the record contains:

<sup>3</sup> We note that the record contains the sole proprietor's 2013 Internal Revenue Service (IRS) Form 1040, U.S. Individual Income Tax Return. However, the petition must establish its ability to pay the proffered wage from 2014 onwards.

<sup>4</sup> We may deny an application or petition that fails to comply with the technical requirements of the law 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 (9<sup>th</sup> Cir. 2003); *Id.*

- 2013 Internal Revenue Service (IRS) Form 1040, U.S. Individual Income Tax Return for [REDACTED] and Schedule C, Profit or Loss from Business, reflecting dba [REDACTED] and Federal Employer Identification Number (FEIN) [REDACTED]
- California Secretary of State Business Entity Details for [REDACTED] incorporated on March [REDACTED]
- [REDACTED] MD, a [REDACTED] 2014 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, reflecting the same address as the petitioner, FEIN [REDACTED] and date of incorporation as March [REDACTED]
- [REDACTED]; IRS Third Quarter Form 941, Employers Quarterly Federal Tax Return reflecting that the business closed/stopped paying wages as of July 31, 2014.
- [REDACTED]; IRS Third and Fourth Quarter Forms 941 reflecting payment of wages in these quarters and [REDACTED] as its trade name.

The evidence in the record establishes that, at the time [REDACTED] filed the Form I-140 immigrant petition on August 12, 2014 the business had already incorporated and closed its activities as a sole proprietorship.

While the evidence in the record reflects that [REDACTED] is the successor-in-interest to the petitioner, all evidence reflects that [REDACTED] no longer continued to operate to a degree which required a permanent, full-time registered nurse, the proffered position listed on the Form I-140. As such the record does not reflect that a *bona fide* job offer with the petitioner, [REDACTED], existed as of the time the petition and labor certification was filed on August 12, 2014, or even at the time of posting the offered position, as required by 20. C.F.R § 656.10(d).

### **Eligibility for the Classification Sought**

Beyond the decision of the director, we find that the educational requirements for the nursing profession is no higher than a Bachelor of Science degree, making the job offer inappropriate to a petition for an advanced degree professional. Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

- (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

In summary, a petition for an advanced degree professional must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree.

In the instant case, Part H of the labor certification submitted with the petition states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor's degree in nursing.
- H.5. Training: None required.
- H.6. Experience in the job offered: 60 months of experience.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: State of California Registered Nurse License.

The job title of the offered position as listed on the ETA Form 9089 and the Form I-140 is registered nurse. The prevailing wage determination issued by the U.S. Department of Labor (DOL) assigns the occupation title of Registered Nurse with the occupational code of 29-1141. The DOL's occupational codes are assigned based on normalized occupational standards. The occupational classification of the offered position is determined by the DOL (or applicable State Workforce Agency) during the labor certification process, and the applicable occupational classification code is noted on the labor certification form. O\*NET is the current occupational classification system used by the DOL. Located online at <http://online.onetcenter.org>, O\*NET is described as "the nation's

primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations." O\*NET incorporates the Standard Occupational Classification (SOC) system, which is designed to cover all occupations in the United States. See [www.bls.gov/soc/socguide.htm](http://www.bls.gov/soc/socguide.htm).

According to O\*NET, only 23% of people in this occupation hold a bachelor's degree. O\*NET also states that the assigned occupational classification falls within Job Zone Three. See <http://www.onetonline.org/link/summary/29-1141.00> (accessed March 10, 2015). A Job Zone is a group of occupations that are similar in how much education, related experience and/or training people need to do the work. See <http://www.onetonline.org/help/online/zones>.

The following education, experience and/or training is required for a Job Zone Three occupation:<sup>5</sup>

**Education:** Most occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree.

**Related Experience:** Previous work-related skill, knowledge, or experience is required for these occupations. For example, an electrician must have completed three or four years of apprenticeship or several years of vocational training, and often must have passed a licensing exam, in order to perform the job.

**Job Training:** Employees in these occupations usually need one or two years of training involving both on-the-job experience and informal training with experienced workers. A recognized apprenticeship program may be associated with these occupations.

**Job Zone Examples:** These occupations usually involve using communication and organizational skills to coordinate, supervise, manage, or train others to accomplish goals. Examples include food service managers, electricians, agricultural technicians, legal secretaries, interviewers, and insurance sales agents.

Job Zone Three correlates to a Specific Vocational Preparation (SVP) of 6. *Id.* SVP, as defined in Appendix C of the *Dictionary of Occupational Titles*, is the amount of time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in the occupation. Occupations with an SVP of 6 require over one year up to and including two years of training. See [www.onetonline.org/help/online/svp](http://www.onetonline.org/help/online/svp) (accessed March 10, 2015). This training may be acquired by education, training or work experience. *Id.* The DOL considers a bachelor's degree to constitute two years of SVP training. See DOL Field Memorandum No. 48-94 (May 16, 1994).

The corresponding entry in the Occupational Outlook Handbook (OOH) for the assigned occupational code of 29-1141.00 is registered nurse.<sup>6</sup> The required education for this occupation is summarized as

<sup>5</sup> See [www.flcdatacenter.com/jobzone.aspx](http://www.flcdatacenter.com/jobzone.aspx) (accessed March 10, 2015).

<sup>6</sup> The OOH, located at <http://www.bls.gov/oco>, is a nationally recognized source of career information published by the



three major educational paths— a Bachelor of Science degree in nursing (BSN), an associate degree in nursing (ADN), and a diploma from a hospital. *See* [www.bls.gov/ooh/healthcare/registered-nurses.htm](http://www.bls.gov/ooh/healthcare/registered-nurses.htm) (accessed March 10, 2015). BSN programs, offered by colleges and universities, take about 4 years to complete. ADN programs, offered by community and junior colleges, take about 2 to 3 years to complete. Diploma programs, administered in hospitals, last about 3 years. In general, licensed graduates of any of the three types of educational programs qualify for entry-level nursing positions. Thus, a registered nurse position that does not involve an advanced and specialized practice does not necessarily require even a bachelor's degree, much less a master's degree or a bachelor's degree plus five (5) years of experience.

In response to our NOID/RFE the petitioner states that the education and experience requirements are justified by business necessity, bear a reasonable relationship to its business and are essential to perform the job duties in a reasonable manner. The petitioner states that it is a medical clinic which has to provide high level medical services to its patients and that the registered nurse position is a senior level position that requires more education/training and experience. However, the job duties listed on the labor certification are those of a registered nurse and do not reflect those of an advanced nursing position which would qualify for classification as an advanced degree professional. There is nothing in the job description of the proffered position that distinguishes it from an ordinary registered nurse. The educational requirement in the ETA Form 9089 is not what is normally required for the occupation and exceeds the educational requirement discussed in the DOL resources. *See* 20 C.F.R. § 656.17(h)(1)

According to the DOL's occupational data, a baccalaureate degree is not required for entry into the occupation of registered nurse and the position of registered nurse is not a professional occupation as defined at 8 C.F.R. § 204.5(k)(2). Therefore, the petition does not qualify for the advanced degree professional classification.

In response to the NOID/RFE, counsel for the petitioner states that “Schedule A regulations do not limit the educational requirement at a certain level,” and “whether the job opportunity’s education and experience requirements are normal. . . or unduly restrictive are not be [sic] relevant for Schedule A cases.” However, counsel cites no regulation, case law or precedent decision in support of this assertion.

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, 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.