(b)(6)

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

DATE: MAY 0 1 2015

IN RE: 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:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO**.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner describes itself as a staffing business and seeks to permanently employ the beneficiary in the United States as a nurse supervisor. 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).[1]

The director denied the petition because the evidence in the record does not establish that the beneficiary possesses 60 months of experience in the job offered as a nurse supervisor to qualify as an advanced degree professional and to meet the terms of the labor certification.

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.

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.[2]

The petition is for a Schedule A occupation which 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.*

The issues on appeal are: (1) whether or not the beneficiary is qualified for the position offered and meets the terms of the labor certification; and (2) beyond the decision of the director, whether the position offered qualifies as a Schedule A occupation.

[1] 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

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

Beneficiary's Qualifications

The petitioner must establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating 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 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 the instant case, Part H of the ETA Form 9089 submitted with the petition states that the offered position has the following minimum requirements:

H.4. Education: Bachelor's degree.
H.4-B. Major field of study: Left blank.
H.5. Training: None required.
H.6. Experience in the job offered: 60 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: Master's degree.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: Candidate must have State RN license, or passed the NCLEX. Master's degree in Nursing, or Bachelor's degree in Nursing plus 60 months post-baccalaureate experience.[3]

Part J of the ETA Form 9089 indicates that the beneficiary possesses a Bachelor of Science degree in Nursing from [redacted] University in [redacted] the Philippines. The record contains a copy of the beneficiary's Bachelor's degree in Nursing and accompanying transcripts.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).[4] USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[5]

[3] We note that the requirements listed in Part H.14 of the labor certification are inconsistent and conflict with the requirements listed in Parts H.6 and H.10. Part H.6 requires experience in the job offered [nurse supervisor] and Part H.10 does not allow for experience in an alternate occupation. Part H.14 states that 60 months of post-baccalaureate experience is required but it does not specify any other details about the experience required.

[4] According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." *See* http://edge.aacrao.org/info.php.

[5] In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco*

According to EDGE, a Bachelor of Science degree from the Philippines is comparable to a bachelor's degree in the United States. While the beneficiary holds a Bachelor of Science degree in Nursing, at issue is whether she also has five (5) years (60 months) of post-baccalaureate experience in the proffered position of nurse supervisor as indicated in Part H.6 of the labor certification.

Part K of the labor certification states that the beneficiary possesses the following employment experience:

- As a Nurse Unit Manager for Maryland beginning May 2010.
- As an ER Staff Nurse at the in the Philippines from December 2007 until September 2009.
- As an OR Staff Nurse at in the Philippines from July 2006 until May 2007.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

The record contains the following letters regarding the beneficiary's employment experience:

- A letter from the Medical Center, indicating that the beneficiary was employed there as an Operating Room Nurse from July 1, 2006 until May 31, 2007.
- A letter from the Hospital Director for Medical Center, indicating that the beneficiary was employed there as an Operating Room Staff Nurse from December 17, 2007 until September 30, 2009.
- An undated letter from the Assistant Director of Nursing at indicating that the beneficiary was employed there as a Staff Training and Development Specialist from May 2010 to May 2011, as an Evening Supervisor from June 2011 to October 2011, and a Unit Manager beginning in November 2011.[6]

Group, Inc. v. Napolitano, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degrees were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc. v. USCIS*, 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

[6] As this letter is undated it is unclear how long the beneficiary was employed as a Unit Manager for

While these letters meet the requirements of 8 C.F.R. § 204.5(g)(1), the job duties listed in the letters from the Medical Center and Medical Center reflect that the beneficiary did not perform job duties provided on the labor certificate for a nurse supervisor. The primary requirements of the labor certification are a bachelor's degree in Nursing and five years of experience in the job offered [Nurse Supervisor].[7] As such, these letters do not establish that the beneficiary gained at least 60 months of experience as a nurse supervisor which would qualify her for the proffered position.

Schedule A

Beyond the decision of the director,[8] we conclude that the position offered, nurse supervisor, does not qualify as a Schedule A occupation. As stated above, the petition was filed for a Schedule A occupation, which is an occupation codified at 20 C.F.R. § 656.5(a) for which the DOL has determined that there are not sufficient U.S. workers who are able, willing, qualified and available to fill certain 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 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.

According to the DOL's Occupational Outlook Handbook (OOH), the job duties for a professional nurse include:

- Record patients' medical histories and symptoms.
- Administer patients' medicines and treatments.
- Set up plans for patients' care or contribute to existing plans.
- Observe patient and record observations.
- Consult with doctors and other healthcare professionals.
- Operate and monitor medical equipment.
- Help perform diagnostic tests and analyze results.

The above job duties are all central to patient care. The job duties of the instant position of nurse supervisor include:

- Supervise RNs, LPNs and CNAs.
- Set up work schedules.

[7] As noted above, the primary requirements listed on the labor certification in Parts H.6 and H.10 (five years of experience as a nurse supervisor with no experience in an alternate occupation allowed) conflict with the requirements listed in Part H.14 (60 months of post-baccalaureate experience).

[8] 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).

- Ensure that nursing records are correctly maintained, the report is correctly given at each shift change, and that equipment and the other supplies are in stock.
- Plans and organizes activities in nursing services, such as obstetrics, pediatrics, or surgery, or for two or more patient-care units to procedures.

The above job duties do not involve any patient care. Rather the job duties of nurse supervisor as listed on the ETA Form 9089 are focused on administration of nurses. As the job duties of a nurse supervisor as described in the instant petition are substantially different from those of a professional nurse, it has not been established that the proffered position may be classified as a Schedule A occupation, one for which the DOL has determined that there are not sufficient U.S. workers.

Therefore, the petitioner has not established that the proffered job of nurse supervisor meets the definition of professional nurse under 20 C.F.R. § 656.5 to qualify as a Schedule A, Group I occupation. The petitioner has not established that a labor certification is not required for the proffered position. The regulation at 8 C.F.R. § 204.5(a)(2) specifies that the Form I-140 petition filed on behalf of the beneficiary must be supported by an individual labor certification from the DOL. If the petition is not supported by a certified ETA Form 9089, the petition cannot be approved.

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). 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).

Ability to Pay the Proffered Wage

Also beyond the decision of the director, the petitioner has not established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The priority date of the instant petition is August 22, 2013.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[9] If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).

[9] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), aff'd, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

While we note that the petitioner has submitted its 2011 federal tax return, the record does not contain its tax return for 2013 and 2014. Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *See* 8 C.F.R. § 204.5(g)(2). Therefore, the evidence in the record has not established the petitioner's ability to pay the proffered wage from the priority date onward.

Further, USCIS records indicate that the petitioner has filed over 80 Form I-140 immigrant petitions on behalf of other beneficiaries since the August 22, 2013 priority date. Consequently, USCIS must also take into account the petitioner's ability to pay the beneficiary's wages in the context of its overall recruitment efforts. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. The record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence.

Debarred Entity

We note that, pursuant to a February 18, 2015, Memorandum from Donald Neufeld (Neufeld Memo), the petitioner is listed as a debarred entity. Pursuant to the Neufeld Memo, no immigrant visa petitions and no H, L, O, or P-1 nonimmigrant visa petitions filed with respect to the petitioner shall be approved for a period of one year, commencing on August 1, 2014, and ending on July 31, 2015.[10]

The petitioner in this case was the subject of an investigation by the DOL in accordance with the H-1B provisions of the Act. *See generally* 20 C.F.R. § 655 related to Temporary Employment of Aliens in the United States; and 8 C.F.R. § 214.2(h) provisions related to H-1B nonimmigrants. If DOL determines that there has been a violation of 20 C.F.R. § 655, then under 20 C.F.R. § 655.855(c), USCIS shall not approve a petition during the debarment period: USCIS "shall not approve petitions filed with respect to that employer under sections 204 or 214(c) of the INA (8 U.S.C. 1154 and 1184(c)) for the period of time provided by the Act and described in Sec. 655.810(f)."[11]

[10] *See* www.dol.gov/whd/immigration/H1BDebarment.htm (accessed April 9, 2015).

[11] We note that certain statutes that preclude USCIS from approving applications effectively require that USCIS deny the application. For instance, the language of Sections 204(c), (d), and (g) of the Act all similarly provide that "notwithstanding [the relevant applicable subsections] . . . no petition shall be approved if [the following facts are present]." Further, on October 21, 1998, President Clinton signed into law the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, which incorporated several immigration-related provisions, including the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). ACWIA mandated new requirements for petitioners filing for H-1B beneficiaries. Pursuant to ACWIA, penalties were established for H-1B violations on a three tier system: (1) the first tier would encompass non-willful conduct, or less substantial violations such as failure to meet strike, lockout or layoff attestations; failure to meet notice or recruitment attestations; or misrepresentation of a material fact on a labor condition application, and would result in fines of not more than $1,000 per violation and result in the mandatory debarment of at least one year. *See* ACWIA § 413(a) incorporated at

Conclusion

In summary, the petitioner has not established that the beneficiary meets the minimum educational and experience requirements of the instant labor certification or that the proffered position is for a Schedule A occupation. Further, the petitioner is a debarred entity. Therefore, the petition cannot be approved in the advanced degree professional preference classification under section 203(b)(2) of the Act. We also note that the petitioner has not established its ability to pay the proffered wage from the priority date onward. The director's decision denying the petition is affirmed.

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.

212(n)(2)(C)(i) of the Act; (2) willful violations, such as willful failure to meet any attestation condition; willful misrepresentation; or actions taken in retaliation against whistleblowers, which would result in a fine of not more than $5,000 per violation, and mandatory debarment of two years. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(ii) of the Act; and (3) willful violations that result in layoffs, such as a violation of the attestation, or misrepresentation of a material fact in the course where an employer displaces a U.S. worker, which would result in a fine not to exceed $35,000 per violation, and mandatory debarment of at least three years. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(iii) of the Act.