



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

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

MATTER OF L-H-A-H-P-, LLC

DATE: OCT. 6, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a healthcare staffing business, seeks to permanently employ the Beneficiary in the United States as a registered nurse. It requests classification of the Beneficiary under the preference allocation for employment-based immigrants. *See* Immigration and Nationality Act (the Act) section 203(b), 8 U.S.C. § 1153(b). This employment-based immigrant allocation allows a U.S. employer to sponsor priority workers, professionals holding an advanced degree, skilled workers, professionals, or other workers for lawful permanent resident status.

The Director of the Texas Service Center denied the petition after determining that the Petitioner had not established that the Beneficiary possessed an advanced degree as is required for second preference immigrant classification under section 203(b)(2) of the Act.

On appeal, the Petitioner asserts that it petitioned for classification of the Beneficiary as a skilled worker under the third preference classification, which is governed by section 203(b)(3) of the Act and that the Director had erroneously applied the standards of the second preference classification.

Upon *de novo* review, we will remand the matter for further proceedings.

I. LAW

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. 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 an uncertified ETA Form 9089, Application for Permanent Employment Certification.

II. ANALYSIS

Among other things, a petition for a Schedule A occupation must demonstrate that the job offered and the beneficiary qualify for the requested classification. In a petition for classification as an advanced degree professional, 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 addition, a petition for an advanced degree professional must establish that the beneficiary is a member of the professions holding an advanced degree. Section 203(b)(2) of the Act. An “advanced degree” is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, or a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(2). In a petition for classification as a skilled worker, the job offered must require, and the beneficiary must possess, at least two years of training or experience. 8 C.F.R. § 204.5(l)(3)(ii)(B) and (l)(4). Relevant post-secondary education may be considered training. 8 C.F.R. § 204.5(l)(2). Regardless of the classification requested, the petitioner must also demonstrate that the beneficiary meets all of the requirements of the offered position set forth on the labor certification by the priority date. *Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Acting Reg’l Comm’r 1977).¹

In this case, the petition bears a hand-checked box at “Petition Type” (Part 2, Line 1.d) denoting that the petition seeks classification of the Beneficiary as a professional holding an advanced degree under section 203(b)(2)(B) INA.² The labor certification requires candidates to possess a minimum of an associate’s degree in nursing and the Beneficiary possesses a bachelor of science in nursing degree from [REDACTED] Philippines, which is a foreign degree equivalent to a U.S. bachelor’s degree.

The Director issued a notice of intent to deny (NOID) noting that the Beneficiary does not possess an advanced degree and, therefore, does not qualify for classification as a professional holding an advanced degree. The Director also stated that the job offer allows candidates to qualify for the position with less than an advanced degree and, therefore, the job offer does not qualify to classify a beneficiary as a professional holding an advanced degree. In response to the NOID, the Petitioner stated that it had “inadvertently left Part 2 Petition Type blank in the initial filing.” The Petitioner characterized the omission as a “harmless error as the labor certification . . . clearly indicates Associate’s degree and no experience.”

The Director issued a second NOID, finding that the Petitioner had not established that the Beneficiary satisfied the education requirements of the labor certification. The Director cited the regulations at 8 C.F.R. § 204.5(l)(2)-(3) defining the requirements for classification as a skilled worker and found that the Beneficiary’s bachelor’s degree did not satisfy the labor certification’s requirement that candidates possess a minimum of an associate’s degree. In response to the second

¹ The priority date of a petition filed for Schedule A classification “shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed.” 8 C.F.R. § 204.5(d).

² Aside from a hand-written notation to “see addendum” at Part 6, Line 8, the petition is otherwise entirely typed.

NOID, the Petitioner stated that since the Beneficiary possessed a foreign equivalent degree to a U.S. bachelor's degree, it had established that the Beneficiary possessed at least an associate's degree as required by the labor certification. The Director then denied the petition, concluding that the Beneficiary did not possess an advanced degree and, therefore, did not satisfy the requirements for classification as a professional holding an advanced degree.

On appeal, the Petitioner explains that it petitioned for classification as a skilled worker, not as a professional holding an advanced degree, and that the Beneficiary possessed more than the minimum education required by the labor certification and for classification as a skilled worker.

In reviewing the record, we are unable to ascertain which classification the Director considered when adjudicating the petition. In his first NOID, the Director quoted regulations governing classification as a professional holding an advanced degree. However, given the references in the second NOID to regulations governing classification as a skilled worker and the evaluation of the Beneficiary's credentials under such regulations, it appears that the Director may have accepted the Petitioner's request to classify the Beneficiary as a skilled worker. But then, in the denial, the Director reverts to considering the petition under regulations governing classification as a professional holding an advanced degree. In light of the different classifications cited by the Director, it is unclear what classification type was considered by the Director, and which regulatory requirements the Petitioner was expected to satisfy. Therefore, we will remand the matter to the Director for clarification in a new decision.

III. ADDITIONAL ISSUES OF INELIGIBILITY

Because the sole ground for the denial of the petition remains ambiguous, the matter must be remanded for clarification. However, we will briefly identify additional grounds of ineligibility that should be addressed in future proceedings.

A. Ability to Pay the Proffered Wage

As stated by the Director in both NOIDs, but not stated as a ground for denial, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward. The Petitioner submitted copies of its contracts with the facilities where it places employees and asserted that the revenue generated by the Beneficiary would exceed the proffered wage. However, while *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967), allows us to consider the totality of a petitioner's financial situation beyond simply its net income and net current assets, 8 C.F.R. § 204.5(g)(2) still requires a petitioner to submit its annual reports, federal tax returns, or audited financial statements and this evidence is necessary to establish the overall magnitude of its business activities. In this case, the Petitioner has not provided this regulatory required evidence for any year since the September 19, 2016, priority date.

B. Schedule A Requirements

For Schedule A petitions, the petitioner must submit evidence that the employer provided its U.S. workers with notice of the filing of an ETA Form 9089 (Notice) as prescribed by 20 C.F.R. § 656.10(d). The petition must also be accompanied by a valid prevailing wage determination (PWD) obtained in accordance with 20 C.F.R. § 656.40-41. *See* 20 C.F.R. § 656.15(b)(1). Here, the petition lists multiple locations where the Beneficiary could potentially be assigned; therefore, the Notice and PWD requirements must be satisfied for each location.

The petition lists 13 different potential worksites; meanwhile, the application for the PWD lists 16 different locations, but does not include the Nevada, North Carolina, and Texas locations that were listed on the petition. As a result, the DOL did not determine a prevailing wage for these potential worksites and the petition is deficient of this regulatory required evidence. Furthermore, since PWDs were not requested for the Nevada, North Carolina, and Texas worksites, it is not clear that the Notices that were posted at those locations announced the correct rate of pay. We also note that the Notice posted at the [REDACTED] advertised a rate of pay of \$22.51 per hour (\$46,820.80 per year), which is less than the \$46,862 required by the PWD.

C. Successor-in-Interest

Finally, we note that while the appeal was filed by the Petitioner, Counsel's response to our request for a properly completed Form G-28, Notice of Entry of Appearance as Attorney or Representative, states that the Petitioner is now named "[REDACTED] [the Petitioner]." A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). Therefore, if the labor certification is to remain viable for use by an employer other than the business entity that filed the labor certification, that employer must establish itself as a successor-in-interest to the business for which the labor certification was approved. Here, [REDACTED] is not the entity that filed the labor certification. As such, it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). A valid successor relationship may be established for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Counsel submits a copy of a Certificate of Filing from the Texas Secretary of State. While this document "certifies that a Certificate of Amendment for the above named entity has been received," a Certificate of Amendment can affect a number of different changes and the record does not indicate the nature of the amendment here.³ The Petitioner must establish whether a change in ownership or

³ *See* Texas Secretary of State, Form 424-General Information, https://www.sos.state.tx.us/corp/forms/424__boc.pdf (last visited Oct. 2, 2017).

corporate structure accompanied its name change and, if it did, must satisfy all three conditions for successorship described above.

IV. CONCLUSION

The matter is remanded to the Director for clarification of the immigrant classification being considered. The Director should also address the Petitioner's ability to pay the proffered wage to the Beneficiary, whether the Petitioner complied with the PWD and Notice requirements for Schedule A petitions, and whether [REDACTED] is a successor-in-interest to the Petitioner. The Director may request any additional evidence considered pertinent, and the Petitioner may provide additional evidence within a reasonable period of time to be determined by the Director. Upon receipt of all the evidence, the Director will review the entire record and enter a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of L-H-A-H-P-, LLC*, ID# 570880 (AAO Oct. 6, 2017)