



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

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

In Re: 33358826

Date: SEP. 17, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a medical center, seeks to employ the Beneficiary as a registered nurse. It requests classification of the Beneficiary under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that the Beneficiary is qualified for the offered position. The matter is now before us on appeal. 8 C.F.R. § 103.3

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

This petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which 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. *Id.* Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 (ETA 9089) Application for Permanent Employment Certification, 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 9089 in duplicate, and the accompanying Prevailing Wage Determination, Form ETA 9141 (ETA 9141). *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.

II. ANALYSIS

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date.¹ 8 C.F.R. §§ 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The petition is accompanied by an uncertified ETA 9089 and a completed and certified ETA 9141. Part F.b of the ETA 9141 states that the offered position's minimum requirements are a bachelor's or foreign equivalent degree in nursing and six months of experience in nursing. Appendix A of the ETA 9089 states that the Beneficiary qualifies for the offered position based on his bachelor of science in nursing degree awarded by the [REDACTED] in the Philippines. Appendix A also lists the following experience for the Beneficiary:

- Nurse, with [REDACTED] Qatar, from August 2017 with no end date of employment;
- Nurse, with [REDACTED] Philippines, from "0/2014 to 02/2017;" and
- Nurse, with the [REDACTED] in Philippines, from "10/2009 to 14/2014."

Appendix A of the ETA 9089 also lists the following job description for the Beneficiary's position with [REDACTED]

Treat and care for patient after major surgical procedures by monitoring vital signs, administering medication and cleaning surgical wounds. Collaborate with physicians, case managers, wound care, infection control nurse, families, and other staff members when developing plan of care and treatment during hospital stay. Work as Acting Charge Nurse/Team Lead for the unit, and as a nurse preceptor to help train students and newly hire nurses in our facility who are completing their internship duties. Responded to emergency situation where patient is in life threatening situations by following the correct procedures and hospital protocol while maintaining a calm and effective demeanor. Led an initiative as a member of the UBC (Unit Based Council) of our facility to improve patient, family and medical staff communication by conducting workshops to facilitate suggestions. Review, interpret, and evaluate

¹ The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date, which in this case is January 9, 2024.

diagnostic tests to identify and assess patient's condition.

With the initial filing, the Petitioner submitted a copy of a bachelor of science in nursing degree issued to the Beneficiary in 2008 by the [REDACTED] in the Philippines, as well as academic transcripts and an evaluation of his academic credentials. The evaluation states that the Beneficiary's bachelor of science in nursing degree is the equivalent of a bachelor of science degree in nursing from an accredited institution of higher education in the United States.

The Director issued a request for evidence (RFE) noting that the initial filing did not include evidence of the Beneficiary's six months of experience required for the offered position as required by the labor certification. The Director requested additional evidence of the Beneficiary's qualifications as a professional nurse, including a license. She also requested a letter from the Beneficiary's current or former employer stating his dates of employment. The Director specifically stated that the letter "must list the writer's name, address, and title, and a specific description of the beneficiary's duties."

In response to the RFE the Petitioner provided a letter dated February 5, 2024, on [REDACTED] [REDACTED] letterhead. The letter is signed by the Chief Human Resources Officer and states that the Beneficiary is employed as a "Graduate Registered Nurse (CF) in the Male Surgery – Inpatient department of [REDACTED]. The letter states that the Beneficiary "joined [REDACTED] on August 20, 2017 and is in service up to date."

The Director denied the petition concluding that, because the experience letter did not include a description of the Beneficiary's duties, the Petitioner had not established that the Beneficiary possessed the minimum experience required for the offered position.

On appeal, the Petitioner notes that a job description for the Beneficiary's employment with [REDACTED] [REDACTED] was provided on Appendix A of the ETA 9089. It submits a job description for the position of "Graduate Registered Nurse (CF)" on [REDACTED] letterhead.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

- (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The new evidence submitted on appeal, combined with the experience letter in the record meets the requirements of 8 C.F.R. § 204.5(l)(3). However, additional information casts doubt on the Beneficiary's qualifying experience. The information in the ETA 9089 and experience letter is inconsistent with nonimmigrant visa applications that the Beneficiary submitted in 2021 and 2023.

In his prior nonimmigrant visa applications, the Beneficiary lists his current employment as nurse with the [REDACTED]. In 2021, the Beneficiary stated that this employment began

January 15, 2015 and that he had no previous employment. In 2023, the Beneficiary stated that this employment began February 1, 2021 and that he had no previous employment. Both of these prior claims are inconsistent with the experience letter and the ETA 9089 which state that the Beneficiary was employed by [REDACTED] from August 20, 2017 until at least February 5, 2024, the date the letter was signed. The inconsistencies in the Beneficiary's employment history cast doubt as to his possession of the required experience for the offered position. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

Because we cannot affirmatively find that the Beneficiary possesses the experience required for the offered position and the Petitioner is not on notice of this issue, we will remand the matter to the Director for further consideration. On remand, the Director may wish to issue a new RFE outlining the deficiencies above, requesting additional independent objective evidence in support, and allowing the Petitioner an opportunity to respond.

In a new RFE, the Director may also wish to request evidence to establish the Petitioner's continuing ability to pay the offered wage of \$79,747 per year. The record includes the Petitioner's consolidated financial statements for 2021 to 2022. However, to be eligible for the classification it requests for the Beneficiary, the Petitioner must establish that it has the ability to pay the proffered wage stated on the labor certification from the January 2024 priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).

The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." The record does not contain regulatory-required evidence of the Petitioner's continuing ability to pay the proffered wage in the year of the priority date. Although the record includes the Petitioner's financial statements for 2021 to 2022, this evidence is before the priority date and does not demonstrate the Petitioner's continuing ability to pay the proffered wage. We acknowledge that evidence for 2024 may have been limited at the time of filing, but should be available on remand. Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date.

We note that where a petitioner has filed I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. See *Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions). USCIS records show that the Petitioner has filed Form I-140 petitions for 35 other beneficiaries in the last three years. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.

II. CONCLUSION

The record does not demonstrate affirmatively that the Petitioner is eligible for the benefit sought, including whether the Beneficiary possesses the minimum experience required for the offered position and whether the Petitioner can establish that it has the ability to pay the Beneficiary's proffered wage as required by 8 C.F.R. § 204.5(g)(2). Therefore, we will remand this case to the Director for further consideration. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.