

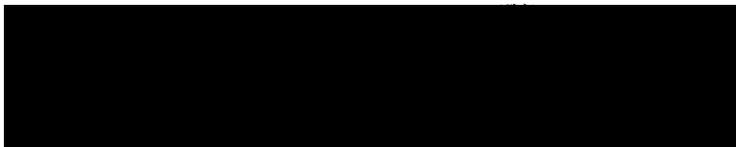
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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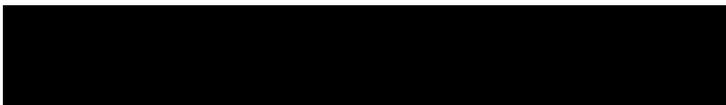
ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536



File:  Office: TEXAS SERVICE CENTER
SRC 01 121 50380

Date: **DEC 13 2003**

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



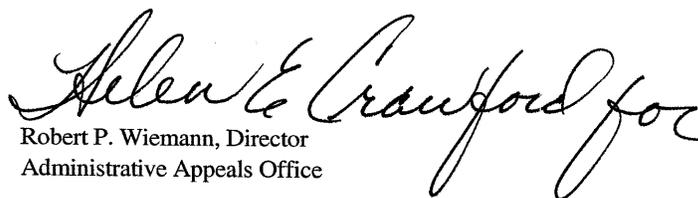
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a non-profit hospital. It seeks to employ the beneficiary permanently in the United States as a specialty care registered nurse I. The petitioner asserts that the beneficiary qualifies for certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Eligibility in this matter hinges on the qualifications of the beneficiary for the position at the priority date. Employment-based petitions depend on priority dates. The priority date for Schedule A occupations is established when the I-140 is properly filed with Citizenship and Immigration Services (CIS), formerly the Service or INS. 8 C.F.R. § 204.5(d). The petition must be accompanied by the documents required by the particular section of the regulations under which it is submitted. 8 C.F.R. § 103.2(b)(1). The priority date of the petition in this case is March 8, 2001.

The petitioner initially submitted insufficient evidence of the beneficiary's qualifications for the position. In a request for evidence dated December 17, 2001 (RFE1), the director required a copy of the posting of the notice of the filing of a Form ETA 750. 20 C.F.R. § 656.20(g)(1), (3), and (8).

In response, the petitioner submitted a notice for specialty care registered nurse I, posted from January 15-29, 2001 (job posting). It stated a salary of \$20.19 for a 40-hour workweek and requirements of:

- 1) Current Florida Nursing License (RN)
- 2) At least 1 year of critical care experience
- 3) Current Basic Life Support certification within 6 months.

In a request dated March 20, 2002 (RFE2), the director required a new Form ETA 750 (ETA2) to reflect minimum requirements of the job posting.

ETA2 stated a new requirement for minimum experience of one (1) year in the job offered, in block 14. Under (*Duties*), in block 13, the petitioner stated:

Minimum qualifications for this position include graduation from an accredited school of nursing, at least one year of critical care experience, and a current Florida nursing license. BCLS [Basic Cardiac Life Support] certification must be secured within 6 months of employment.

The director stated that no evidence supported one (1) year of experience. The director, also, determined that the Form ETA 750 did not list the requirement for BCLS certification, though the job posting did. The director concluded that the job requirements in the ETA 750 could not be less than those in the job posting and denied the petition for certification under Schedule A.

In Point 3., (B) on appeal, counsel analyzes experience, required by ETA2, block 14, and argues:

The petitioner has established that the beneficiary has at least one year of experience.

[ETA2] Part B establishes that the beneficiary has been working as a registered nurse since 1988. Indeed, he has been working as a registered nurse for the petitioning employer, in a TN [North American Free Trade Agreement or NAFTA] status, since November of 2000. . . . we presupposed that the letter that supported the original grant of TN status, along with the letter supporting its extension at the end of the first year would be sufficient to establish that the beneficiary has in fact been working as a registered nurse for the petitioner for longer than the one year of experience that is required.

8 C.F.R. § 204.5(g)(1) demands, contrary to the presupposition, that:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific

description of the duties performed by the alien or of the training received. . . .

The petitioner has not provided the original grant of TN status or the letter extending it at the end of the first year. The record before the director did not justify the assumption of one (1) year of experience.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The RFE requested the evidence of experience in accord with 8 C.F.R. § 204.5(g)(2). Only on appeal (exhibits 6 and 7) did the petitioner present letters of former employers, as to generic experience. If the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the Bureau. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Counsel advises of the job posting, however, that:

Two internal notices were posted, in accordance with the Regulations, and a copy was provided to the Texas Service Center. . . . The beneficiary's qualifications, as demonstrated on Form ETA 750, Part B and in the supporting documentation, clearly surpass the stated minimums.

. . . While we acknowledge that letters from the beneficiary's previous employers should have been provided to more firmly establish that he has the requisite experience, at this point he has been working for the petitioning hospital for more than one and one-half years, and shouldn't need any additional documentation to establish his eligibility. The petitioner, however, is providing with this appeal a copy of a letter confirming the beneficiary's past employment with [the petitioner].

The record contains one (1) notice, the job posting in connection with ETA1, and, though counsel asserts a second, no other appears in the record of proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In any event, the record does not counter the decision's primary premise, namely, the job requirements in the ETA 750 could not be less than those in the job posting. The job offer portion of the ETA2 settled, however, for one (1) year of generic experience in block 14. In contrast, the job posting noticed the greater demand of one (1) year of critical care experience.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements.

See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Pertinent to the beneficiary's critical care experience, the petitioner's letter of June 12, 2002 (exhibit 8 on appeal) attests to it since November 13, 2000. Thus, it documents only four (4) months, as of the priority date, less than the required one (1) year.

The job posting provided simply for a straight workweek of 40 hours. Both ETA1 and ETA2 specified a workweek of 36 hours and shift differentials. The rate of pay differed, also.

The terms of 8 C.F.R. § 656.20(g), however, require an accurate job posting:

- (8) If an application is filed under the Schedule A procedures at § 656.22 of this part, the [job posting] shall contain a description of the job and rate of pay, and the requirements of paragraphs (g)(3)(ii) and (iii) of this section.

A petitioner must establish the elements for the approval of the petition at the priority date. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Other findings of the director and contentions of the petitioner are moot. The petition was not accompanied by evidence that the beneficiary qualified for classification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I, as of the priority date of the petition. As the petitioner has not complied with the

instructions stipulated in the Department of Labor regulations, at the time of the filing of the petition, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.