

PUBLIC COPY

B6

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

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

ADMINISTRATIVE APPEALS OFFICE  
425 I Street, N.W.  
CIS, AAO, 20 Mass, Rm 3042  
Washington, D.C. 20536

DEC 16, 2003



File: WAC 01 236 54642 Office: CALIFORNIA SERVICE CENTER Date:

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a skilled nursing facility. It seeks to employ the beneficiary permanently in the United States as a registered nurse (RN). The petitioner asserts that the beneficiary qualifies for a blanket labor 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.

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.

Eligibility in this matter turns on the petitioner's evidence of the beneficiary's eligibility for the classification claimed at the priority date, in this instance, the filing of the I-140 on April 30, 2001.

Counsel initially submitted insufficient evidence. In a Request for Evidence dated October 23, 2001 (RFE), the director required documentation of the beneficiary's licensure or examination results from the Commission on Graduates of Foreign Nursing Schools (CGFNS). Also, the RFE mandated evidence of the petitioner's notification and posting of the filing of the ETA 750 for its bargaining representative or employees. See 20 C.F.R. §

656.20(g)(3). The RFE queried the education, experience, and proposed classification. Last, the RFE exacted acceptable proof of the petitioner's ability to pay the proffered wage, such as the statement of a financial officer of an organization with more than 100 employees.

Counsel's partial response of January 17, 2002 (timely response) amended the I-140 to accept the beneficiary's classification, under § 203(b)(3)(A)(i) or (ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i) or (ii), as a Schedule A, Group I registered nurse. The time to respond to the RFE expired on January 18, 2002 under its terms and may not be extended. 8 C.F.R. § 103.2(b)(8)(i)-(iii). Allowance of three (3) days is added for service by mail. 8 C.F.R. § 103.5a(b).

Terms of 8 C.F.R. § 103.2(b) provide, as to partial responses to requests for initial evidence from Citizenship and Immigration Services (CIS), formerly the Service or INS, that:

(11) *Submissions of evidence in response to a [CIS] request.* All evidence submitted in response to a [CIS] request must be submitted at one time. The submission of only some of the requested evidence will be considered a request for a decision based on the record.

On February 5, 2002, 15 days after the allowed time, the director received the response (untimely response) to concerns of the RFE. One matter of fact turned on the successful examination and licensure in the state of the intended employment of the beneficiary. The petitioner's notification and posting, at the intended place of employment, of its filing of Form ETA 750 constituted a second issue. Finally, the ability to pay the proffered wage hinged on the chief financial officer's certification, in the untimely response, that the petitioner is able to meet its financial obligations to its employees. The petition is abandoned and denied in such respects.

Provisions of 8 C.F.R. § 103.2(b) state:

(13) *Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly shall be denied. . . .

Although counsel requested additional time to produce evidence on three (3) issues of eligibility raised in the RFE, the untimely

response and submissions on appeal have no effect.

Section 8 C.F.R. § 103.2(b) both defines other options and negates additional time:

(8) *Request for evidence.* . . . In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence. Additional time may not be granted. Within this period, the applicant or petitioner may:

- (i) Submit all the requested initial or additional evidence;
- (ii) Submit some or none of the requested additional evidence and ask for a decision based on the record; or
- (iii) Withdraw the application or petition.

The partial evidence available in the petitioner's response on January 17, 2002 (timely response) justifies an amendment to consider the petition as one for a Schedule A, Group I registered nurse.

Counsel stipulates and concedes in the timely response that:

With regards to the full and unrestricted license, the alien is scheduled to take another Nclex exam after she failed in her first bid.

Counsel states:

This license was not receive (sic) on time by the appealant (sic) to provide proof to INS regarding her unrestricted RN license No. 5945416.

Counsel submitted two (2) briefs on appeal, one as recent as February 24, 2003. Documents include a notice dated January 24, 2002 that the beneficiary passed the NCLEX-RN examination (examination results), a State of California, Board of Nursing Registration certificate, dated February 7, 2002 (certification) and the beneficiary's nursing registration card expiring August 31, 2003 (license). Merely cumulative evidence appears in VisaScreen of the International Commission on Healthcare Professions, a division of CGFNS, dated August 19, 2002. None pertained to the timely response.

Moreover, the license was issued after the priority date and does not, therefore, support the eligibility of the beneficiary under the I-140 petition. For this additional reason, the petition may not be approved.

A petitioner must establish the elements for the approval of the petition at the time of filing. 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).

In addition, the petitioner did not respond to the RFE's request for evidence of the posting of the notice, to the petitioner's employees or bargaining representative, of the filing of Form ETA 750. See 20 C.F.R. § 656.20(g)(1). The late response, on appeal, in the petitioner's letter merely stated:

This is to certify that we posted the attached job notice at our facility for at least ten (10) consecutive days. . . .

The exhibit and record have no attached job notice. Hence, the record does not show if the notice complied, for classification of Schedule A, Group I professional nurses, with the terms of 20 C.F.R. § 656.20(g)(8) and 20 C.F.R. § 656.20(g)(3)(ii) and (iii). For this further reason, the petition may not be approved.

Where 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 CIS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

The failure, in the timely response, to present evidence of ability to pay is moot. The petitioner did not present the requisite initial evidence. Employment-based petitions depend on priority dates. The priority date is established when the petition is properly filed with CIS for classification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. 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) states to the point:

*Evidence and processing - (1) General.* An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instruction on the form. Any evidence submitted is considered part of the relating application or petition.

Moreover, the RFE requested initial evidence of successful results in the examination or of a full and unrestricted license to practice professional nursing in the State of intended employment as of the priority date. Also, the RFE exacted evidence of the posting and contents of the notice to employees. Since the petitioner did not offer the initial evidence of eligibility at the time of the filing of the I-140, the petition may not be approved. See 8 C.F.R. 103.2(b)(12).

After a review of the initial evidence, the timely and untimely responses to the RFE, the briefs on appeal, and other documents, it is concluded that the petitioner has not established that the beneficiary was eligible for the benefit sought at the priority date of the petition.

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.