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U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
and Immigration
Services

[Redacted]

File: EAC 02 166 50270 Office: VERMONT SERVICE CENTER

Date: APR 26 2004

IN RE: Petitioner:
Beneficiary

[Redacted]

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

ON BEHALF OF PETITIONER:

[Redacted]

PUBLIC COPY

INSTRUCTIONS:

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

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.

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Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a hospital. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10(a), commonly referred to as Schedule A. The director determined that the petitioner had not established that the beneficiary met the job qualifications on the priority date of the petition and denied the petition accordingly.

On appeal, counsel submits a brief.

Section 203(b)(3) of the Act states, in pertinent part:

(A) In general. - Visas shall be made available . . . to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Furthermore, 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The regulation at 20 C.F.R. § 656.10(a)(2) states that, professional nurses are among those qualified for Schedule A designation, if they have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or hold a full and unrestricted license to practice professional nursing in the state of intended employment.

The regulation at 20 C.F.R. § 656.22(c)(2) states,

An employer seeking a Schedule A labor certification as a professional nurse (§ 656.10(a)(2) of this part) shall file, as part of its labor certification application, documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment.

Eligibility in this matter hinges on the petitioner demonstrating that, on the filing date of the petition, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition was filed on April 18, 2002. The Form ETA 750 specifies that the position requires a bachelor's degree in nursing. The petitioner must also demonstrate that, as of April 18, 2002, the beneficiary possessed the qualifications imposed by the regulations.

With the petition counsel submitted no evidence pertinent to the petitioner's ability to pay the proffered wage. Counsel also submitted no evidence that the beneficiary had passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or that the beneficiary held a full and unrestricted (permanent) license to practice nursing in the State of intended employment. The Vermont Service Center therefore requested, on September 5, 2002, that the petitioner provide evidence pertinent to both requirements. The Request for Evidence specifically stated,

If you seek labor certification pursuant to Schedule A, Group I for the beneficiary to be employed as a registered nurse, submit documentation that the beneficiary has passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination; or that the beneficiary holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment.

In response, counsel submitted evidence of the petitioner's ability to pay the proffered wage. Counsel submitted no evidence, however, that the beneficiary had passed the CGFNS Examination; or that the beneficiary holds a license to practice nursing.

Instead, counsel submitted a letter, dated January 23, 2003, in which he stated, pertinent to that requirement, "Beneficiary does not yet have these requirements. However, despite not having them, beneficiary remains qualified for issuance of an approval of the application for an approved I-140." In support of that statement, counsel cited INA § 212(a)(5)(C), which states that health care workers other than physicians must present a certificate from CGFNS or a similar credentialing organization to a consular officer or to CIS upon admission as an immigrant.

The director determined that the evidence submitted did not demonstrate the beneficiary's eligibility for the proffered position on the priority date denied the petition on May 21, 2003. The director noted that 20 C.F.R. § 656.22(c)(2) requires that the petitioner submit, **as part of its labor certification application**, documentation demonstrating that the beneficiary has passed the CGFNS examination or holds a full and unrestricted license to practice nursing. [Emphasis provided.]

On appeal, counsel asserts that CIS previously approved I-140 petitions for registered nurses without being presented either proof that the beneficiary had passed the CGFNS examination or held a nursing license. Counsel further asserted that the petitioner had relied on this policy, which he states was changed without notice.

The regulation at 20 C.F.R. § 656.22(c)(2) provided counsel and the petitioner with notice that they must submit proof that the petitioner had passed the CGFNS examination or held a state nursing license with the

petition and labor certification application. The Request for Evidence provided them with actual notice that CIS intended to enforce that provision. Counsel and the petitioner were then afforded another opportunity to present that evidence, but did not.

The record of proceeding does not contain copies of the visa petitions reference by counsel as previously approved without evidence of the beneficiary's CGFNS or NCLEX qualifications. If those previous immigrant petitions were approved based on the same evidence and assertions contained in the current record, then those approvals constituted clear and gross error. CIS is not required to approve applications or petitions if eligibility has not been documented merely based on prior approvals that may have been erroneous. See e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). CIS need not treat errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1998).

Furthermore, the AAO's authority over the Service Centers is comparable to the relationship between a court of appeals and a district court. The AAO is not bound to follow the decisions of the service centers. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Counsel's previous assertion that, pursuant to INS § 212(a)(5)(C), the beneficiary need not have received a license to practice nursing or a passing score on the CGFNS examination is unconvincing. INA § 212(a)(5)(C) pertains to adjusting or consular processing to lawful permanent resident. It is inapposite to adjudication of an immigrant visa petition.

The filing date was April 18, 2002. The evidence submitted does not demonstrate that the beneficiary was eligible for the proffered position on the filing date. In fact, counsel's letter of January 23, 2003 appears to indicate that the beneficiary was not eligible.

For a petition to be approvable, the petitioner must establish eligibility on the filing date. A petition will not be approved because the petitioner or beneficiary subsequently became eligible. To be eligible for approval, a beneficiary must have all the necessary training, education, and experience specified on the labor certification as of the date that the request for labor certification was accepted for processing by the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Education and experience gained subsequent to the filing date may not be considered in support of the petition, since to do so would result in according the beneficiary a priority date for visa issuance at a time when he is not qualified to perform the duties sought by the petitioner. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971). The petition may not, therefore, be approved.

Beyond the decision of the director, this office notes that the record of proceedings does not contain a copy of the posting notice that should have been filed with the petition. The record also contains no indication that the requisite posting required by 20 C.F.R. § 656.20(g)(3) occurred. This is an additional reason 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.