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Services

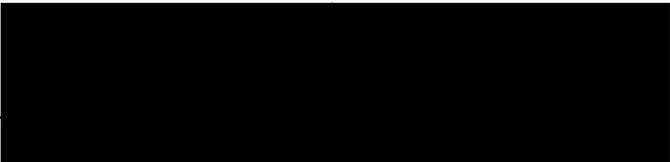
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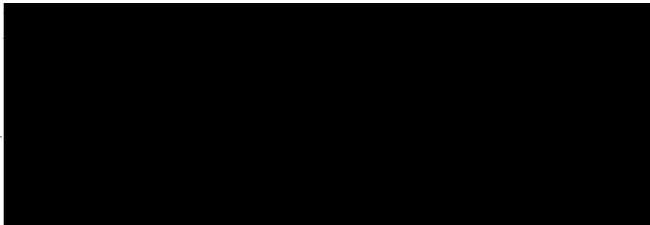


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FILE: WAC 01 239 58215 Office: CALIFORNIA SERVICE CENTER Date: **MAY 25 2004**

IN RE: Petitioner: 
Beneficiary: 

PETITION: 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:


INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann
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 non-profit medical facility. It seeks to employ the beneficiary permanently in the United States as a registered nurse. 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). *See* 20 C.F.R. § 656.22 (a).

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 turns on the petitioner's ability to pay the proffered wage and on the petitioner's qualification of the beneficiary for a blanket labor certification as of priority date. Employment-based petitions depend on priority dates. For Schedule A petitions, the filing of the I-140 with Citizenship and Immigration Services (CIS), formerly the Service or the INS, establishes the priority date. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 27, 2001.

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). For reasons discussed below, the petitioner established the beneficiary's qualification for the blanket labor certification.

The petitioner initially submitted insufficient evidence of the beneficiary's qualifications for the position. In a request for evidence dated September 26, 2001 (RFE), the director required, as of the priority date, a full and unrestricted (permanent) license to practice professional nursing in the State of intended employment or the certificate that the beneficiary had passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) examination. *See* 20 C.F.R. § 656.22(c)(2).

In response, counsel documented that the beneficiary had passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) on February 22, 2001 (NCLEX-RN notice). Other evidence included the front only of the California Board of Registered Nursing (Board) card, said to represent license 594209. The Board card was blacked out partly, expired on June 30, 2003, and nowhere verified that it represented a full and unrestricted (permanent) license to practice professional nursing in California. In fact, the NCLEX-RN notice declared that, though eligible, the beneficiary must obtain a social security number (SSN) from the Social Security Administration (SSA) before the Board could issue a permanent license to practice nursing in California.

The director determined that the petitioner's evidence did not show that the beneficiary either had passed the CGFNS examination or had a full and unrestricted license from the Board. The Director concluded that the beneficiary did not qualify for certification under Schedule A and denied the petition in a decision dated January 26, 2002.

Counsel, on appeal, emphatically bases the petitioner's case for the beneficiary's eligibility on the Board card, said to represent a full and unrestricted license to practice professional nursing in California. To the contrary, the NCLEX-RN notice withholds the permanent license, and the Board card provides no explanation of the supposed change in the Board's position.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Counsel offers no authority to disregard terms of 20 C.F.R. § 656.22(c)(2), *supra*. Even if the Board card represented a permanent license its issuance on February 12, 2002 fails to establish eligibility as of the priority date. The Board card offers no relief. The director could only deny the petition.

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).

The Board withholds action on the permanent nursing license because the Board awaits the beneficiary's SSN from SSA. SSA will not issue the SSN because the beneficiary has overstayed a B-2 visitor's visa, and it did not permit her to work in the United States. See petitioner's Exhibit 9 with the I-140. CIS, in turn, will not approve the I-140 and work authorization because the proceedings lack either CGFNS results or a permanent nursing license. The impasse is complete, since the Board cannot produce a license without the beneficiary's SSN or some evidence of work authorization.

The statute relates eligibility for the immigrant visa to the status of the labor certification at the date of the I-140, namely, the priority date of April 27, 2001. See § 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C). As already noted, Department of Labor regulations limit the petitioner's alternatives, for Schedule A under ETA 750, to the beneficiary's State license or successful CGFNS examination results. See 20 C.F.R. § 656.22(c)(2), *supra*.

After the decision and appeal, however, CIS issued guidance in a memorandum from Thomas E. Cook titled "Adjudication of Form I-140 Petitions for Schedule A nurses" etc. (2002 memorandum), dated December 20, 2002. It considered the adjudication of petitions when Schedule A nurses could not obtain an SSN or a permanent nursing license of a State. If the petitioner met all requirements for Schedule A classification under the I-140, the 2002 memorandum instructed directors of service centers and the AAO and other CIS officials to consider successful NCLEX-RN results favorably. Since they satisfy terms of § 212(r) of the Act, 8 U.S.C. 1182(r), *a fortiori*, they fulfill those of 20 C.F.R. § 656.22(c)(2) for the alternative of approval of the I-140, based on successful examination results.

The beneficiary passed the NCLEX-RN examination on April 20, 2001, before the priority date. The petitioner, therefore, properly qualified the beneficiary as eligible for Schedule A classification under the ETA 750. The 2002 memorandum relied on statutory provisions, and they establish eligibility. *Matter of Katigbak* is distinguishable because NCLEX-RN meets requirements for Schedule A certifications. Since the I-140 and ETA 750 reflected that the beneficiary was eligible for classification under 20 C.F.R. § 656.10, Schedule A, Group I, the petitioner overcame the ground of decision based on examination results.

Since the petitioner applies for labor certifications for Schedule A occupations directly to CIS, the Department of Labor does not review them. Hence, regulations authorize CIS officers to determine the petitioner's compliance with the ETA 750. See 20 C.F.R. §§ 656.22(a) and (e), § 656.20(c), and 8 C.F.R. §§ 204.5(a)(2), (d), and (g)(1).

The 2002 memorandum, however, states that the petitioner must meet all requirements for the approval of the I-140 and Schedule A classification at the priority date. The RFE and decision raised no issue as to other

matters. The petitioner's letter, dated April 18, 2001, and attachments contain various, other documents. *See* Exhibit 1 with I-140. CIS must consider them.

Beyond the director's decision, one document states the dates, but not the place, of the posting of notice of the availability of a job to the employer's employees or their bargaining representatives. As to the posting of notice, the petitioner recites that a copy of the notice of availability is attached, but the proceedings contain none. This defect in the evidence contravenes regulatory requirements for Schedule A petitions in 20 C.F.R. §§ 656.22(b)(1) and (2).

Further, beyond the director's decision, the ETA 750 avers an offer of prearranged employment for 40 hours per week at \$18.50 per hour, or a proffered wage of \$38,480 per year at the petitioner's hospital in Glendale, California. This proffered wage raises an additional issue and affects the petition's status. The Department of Labor, Employment & Training Administration website indicates a 2001 prevailing wage of \$42,203 in the Los Angeles-Long Beach metropolitan statistical area for level 1 registered nurses. The proffered wage, \$38,480 per year, is only 91.18% of the prevailing wage in contravention of 20 C.F.R. §§ 656.20(c)(2) and 656.40(a)(2)(i).

An application or petition that fails to comply with technical requirements of the law may be denied even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003). The AAO reviews such appeals on a *de novo* basis. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.