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

36

[Redacted]

FILE: EAC 01 183 54701 Office: VERMONT SERVICE CENTER Date **MAY 25 2004**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

[Redacted]

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, 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 (AAO) on appeal. The appeal will be remanded.

The petitioner is a nursing home. It seeks to employ the beneficiary permanently in the United States as a staff nurse. The petitioner asserts that the beneficiary qualifies for certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I (Schedule A). 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 for a blanket labor certification, in respect to the beneficiary, 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 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 is April 26, 2001.

The petitioner initially submitted insufficient evidence of the petitioner's privilege for Schedule A certification. In a request for evidence dated September 10, 2001 (RFE), the director required either a full and unrestricted 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 passed the National Council Licensure Examination for registered nurses (NCLEX-RN) on April 10, 2001, asserted that the beneficiary was licensed in the State of New York on May 25, 2001, and showed that the beneficiary had applied to the New Jersey Board of Nursing (Board) for licensure by endorsement on August 28, 2001. The Board withheld action on the application, as CIS had not approved the I-140 and issued evidence of work authorization.

The director determined that the petitioner's evidence did not show that the beneficiary either had passed the CGFNS examination or had held 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 issued January 16, 2002.

Counsel, on appeal, requests relief from the conflicting and irreconcilable requirements of the Board and CIS. That is, the Board will not issue a license until CIS approves the I-140 and issues evidence of employment authorization, and CIS will not approve the I-140 until the Board issues a license. Counsel claimed threshold relief in the registration certificate of The University of the State of New York, through the State Education Department, as establishing that the beneficiary met educational qualifications to practice nursing. On its face, the New York registration certificate, however, disclaimed any status as a license to practice nursing. Moreover, New York was not the State of intended employment. The relief must come otherwise.

The record reflected no license or CGFNS examination results at the priority date. The director necessarily noted that the petitioner must establish the elements for the approval of the petition at the priority date and

denied the petition. 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 statute relates eligibility for the immigrant visa to the status of the labor certification at the date of the I-140 petition for classification, the priority date. 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 the ETA 750, to the beneficiary's State license or successful CGFNS examination results. See 20 C.F.R. § 656.22 (c)(2).

In the problematical situation of the instant case, the Board withholds the permanent nursing license because the beneficiary cannot produce a social security number (SSN) from the Social Security Administration (SSA). SSA will not issue the SSN because the beneficiary has shown no immigration status or authorization to work in the United States. 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 other work authorization.

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 approval of I-140 petitions when the nurse could not obtain a social security number or a permanent nursing license of a State. If the petitioner met all requirements for Schedule A classification under the ETA 750, the 2002 memorandum instructed directors of service centers and AAO and other CIS officials to consider successful NCLEX-RN results favorably. Since they satisfy § 212r(2) of the Act, 8 U.S.C. § 1182r(2), *a fortiori*, they fulfill terms 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 10, 2001, before the priority date. The petitioner, therefore, properly qualified the beneficiary for Schedule A classification under Form ETA 750. The 2002 memorandum relies on the statutory provisions, and they establish eligibility. *Matter of Katigbak* is distinguishable because NCLEX-RN meets requirements for Schedule A certification. 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.

The 2002 memorandum states that the petitioner must meet all requirements for the approval of the I-140 and Schedule A classification. The director's decision sets forth provisions of § 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2)(A). The director's purpose is unclear. That statute sets quotas for a different visa category than Schedule A nurses and appears to be irrelevant. The RFE and decision raised no further issue. CIS must, however, consider other documents in the record.

The petitioner applies for labor certifications for a Schedule A occupations directly to CIS, and the Department of Labor does not review them. Hence, regulations authorize CIS officers to determine the petitioner's compliance. 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 petitioner's letter, dated April 16, 2001, offers a copy of the notice of availability of the nurse's position to the employer's employees or their bargaining representative and of proof of its posting. For requirements, see 20 C.F.R. §§ 656.20(g)(1)(i), (ii), and (8). For posting, see 8 C.F.R. § 656.22 (b)(2).

Beyond the director's decision, however, the petitioner's letter makes an offer for prearranged employment for the beneficiary at \$720 per week, or a proffered wage of \$37,440 per year, at its place of business in Lincoln Park, Morris County, New Jersey, in the Newark metropolitan statistical area. *See* 20 C.F.R. § 656.22 (b)(1). The proffered wage raises an additional issue and affects the petition's status. The website of the Department of Labor, Employment & Training Administration indicates a prevailing wage of \$41,226 in 2001 for level 1 registered nurses in Morris County. The proffered wage, \$37,440 per year, is only 90.82% of the prevailing wage in contravention of 20 C.F.R. §§ 656.20(c)(2) and 656.40(a)(2)(i).

The only defect in this petition appears to be the failure to compute the proffered wage correctly. The petitioner may have the opportunity to amend the ETA 750 to address it.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide further evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.