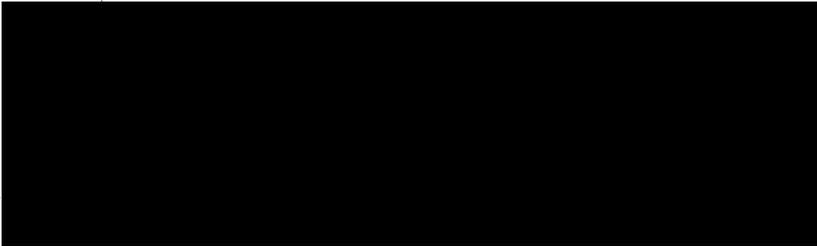


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**U.S. Citizenship
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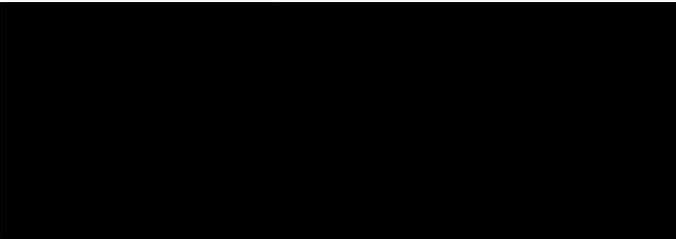
FILE: EAC 01 240 58378 Office: VERMONT SERVICE CENTER Date: **MAY 25 2004**

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, 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 dismissed.

The petitioner is a healthcare contractor/placement agency. 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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

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 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. See 8 C.F.R. § 204.5(d), 20 C.F.R. 656.22(a). 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 petition's priority date in this instance is July 20, 2001. The beneficiary's salary as stated on ETA 750 is \$20 per hour or \$41,600 per year.

The petitioner initially submitted insufficient evidence of the beneficiary's qualifications for the position. In a request for evidence dated October 22, 2001 (RFE), the director required 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). The RFE exacted the contractual agreement between the petitioner, a placement agency, and the facility where the beneficiary would perform duties. Finally, the director requested federal tax returns with all schedules and attachments from the employer and petitioner, to establish the ability to pay the proffered wage at the priority date and continuing to the present.

Counsel responded with the beneficiary's results, demonstrating success on October 27, 2001 on the National Council Licensure Examination for Registered Nurses (NCLEX-RN). On December 27, 2001, the Office of Professions of the State Education Department of the University of the State of New York (Department) advised that the beneficiary met all requirements to issue a license to practice as an RN, except evidence of a valid immigration status. The Service Agreement of the petitioner and Medco Enterprises, Inc. (Medco),

dated December 29, 1999, defined their respective obligations for employees whom the petitioner provided to Medco. Finally, the petitioner submitted its Employer's Quarterly Federal Tax Return (Form 941) for quarters ending June 30, 2000, September 30, 2000, December 31, 2000, and June 30, 2001. No Form 941 related to the priority date.

The director determined that the petitioner's evidence did not show that the beneficiary either passed the CGFNS examination or had an unrestricted and permanent license as an RN from the State of intended employment. The director concluded that the petitioner did not establish the qualifications of the beneficiary for certification under Schedule A, as of the priority date, and denied the petition in a decision dated February 27, 2002.

Counsel, on appeal, states:

[CIS] has traditionally been liberal in its interpretation of the "licensure" requirements for I-140 and I-129 (H-1B petitions), particularly in cases where full eligibility for licensure has been established (either through credentials evaluations and successful examination completion, or both), but the license could not be issued either because the alien-beneficiary is not in the U.S. or does not have a U.S. Social Security number.

Consistent with this liberal interpretation are the guidelines set forth in HQ 70/6.2.8 (see attached)-**Social Security Card and the Adjudication of H-1B Petitions** (November 20, 2001) from [CIS].

The instant appeal, however, involves an I-140 immigrant petition. The H1-B memorandum involves a non-immigrant petition, does not constitute official CIS policy, and will not be considered as such in the adjudication of petitions or applications. Moreover, letters and correspondence issued by offices of CIS are not binding on the AAO. Although such memoranda may be useful as an aid in interpreting the law, they are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letter Drafted by the Office of Adjudications*, (December 7, 2000).

Nonetheless, the pertinent statute is persuasive and provides for the equivalence of successful results on the NCLEX-RN examination. See § 212(r)(2) of the Act, 8 U.S.C. § 1182(r)(2). Furthermore, guidance in "Adjudication of Form I-140 Petitions for Schedule A Nurses Temporarily Unable to Obtain Social Security Cards," dated December 20, 2002 (2002 memorandum), applies to the I-140:

Previously, the I-140 petition could not be approved for a foreign nurse admitted into the U.S. who had not taken the CGFNS examination or lacked evidence of actually being in possession of a full and unrestricted (permanent) state nursing license. This was because DOL [Department of Labor] regulations and policy did not extend eligibility for a schedule A labor certification to such individuals. However, on October 2, 2002, DOL advised [CIS] that, in adjudicating EB-3 petitions on behalf of nurses, [CIS] may also accept documentation that the alien beneficiary has passed the NCLEX-RN examination as eligibility for a schedule A labor certification.

Guidance for Adjudication of an I-140 petition for a foreign nurse:

Provided that all other requirements applicable to the petition are met, this memorandum instructs all Service Centers to favorably consider the I-140 petition for a foreign nurse, as being

eligible for a schedule A labor certification, upon presentation of a certified copy of a letter from the state of intended employment which confirms that the alien has passed the NCLEX-RN examination and is eligible to be issued a license to practice nursing in that state.

The 2002 memorandum concludes that the petitioner must meet all requirements of the classification in order to demonstrate the qualifications of the beneficiary. The petitioner did not establish successful examination results until October 27, 2001, over three (3) months after the priority date. The New York Department did not issue its letter confirming eligibility for a license to practice nursing until December 27, 2001, over five (5) months after the priority date. Consequently, the petitioner has not overcome the basis of the director's decision.

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).

Beyond the decision of the director, the petitioner has not established the posting of the notice of availability of the job opportunity at the site of the intended employment. The petitioner provided, on its letterhead, copies of the notice and of the evidence of posting, at the address and office that it shares with its counsel.

The proof of posting merely states:

This is to certify that Notice of Filing the [ETA 750] has been provided by this facility to its employees in connection with the [I-140] for the following alien worker.

[the beneficiary]

The notice and proof of posting reference only the petitioner, counsel and their employees. No notice or certification reflected any posting at the facility or location of the employment, set forth as another address in Form ETA 750, Part A, item 7. The applicable regulation requires posting in conspicuous places, where the employer's U.S. workers can readily read the posted notice on the way to and from their place of employment. The regulation gives, as examples, places where the employer posts wage and hour notices and occupational health and safety notices pertinent to the job opportunity. Posting at the offices of the petitioner and counsel violates the regulation at 20 C.F.R. § 656.20(g)(1)(ii).

The posting at the offices of the petitioner and counsel wholly defeats the purpose of the general provisions of the relevant regulation, to give any person the opportunity to provide relevant documentation as to the petitioner's application and its effect on employment in the work place and locally. *See* 20 C.F.R. § 656.20(g)(3)(iii). Though not a basis of this decision, these circumstances prevent the approval of this petition, as requested by the petitioner.

Furthermore, the Service Agreement with Medco appears to be a generic example only, dated December 29, 1999. It does not, apparently, relate to any agreement that the beneficiary executed for any employment at any facility or location. Extensive, unexplained alterations, also, undermine its materiality and credibility. These proceedings do not reveal the employer, relevant job opportunity, or persons who might provide documentary evidence bearing on Form ETA 750, as prescribed in 20 C.F.R. §§ 656.20(g)(3)(i)-(iii). These

further circumstances, though not a basis of this decision, prevent the approval of this petition, as requested by the petitioner

The petitioner did not establish, as of the priority date of the petition, that NCLEX-RN test results qualified the beneficiary for classification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. Further, though not a basis of this decision, the petitioner did not comply, at the priority date, with the instructions stipulated in the Department of Labor regulations, concerning the posting of notice of the availability of the relevant job opportunity. For this additional reason, the AAO may not approve the I-140, as counsel requests.

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.