



U.S. Citizenship
and Immigration
Services

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FILE: WAC-01-257-52756 Office: CALIFORNIA SERVICE CENTER Date: SEP 07 2004

IN RE: Petitioner: [Redacted]
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:



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.

for Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The employment based immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a convalescent hospital and nursing home. It seeks to employ the beneficiary permanently in the United States as a registered nurse. 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). The director determined that the petitioner had not established that the beneficiary possessed the necessary licensing credentials required by the regulations applicable to the admission of registered nurses under Schedule A, Group I.

On appeal, the petitioner, through counsel, asserts that the petitioner satisfied the applicable requirements for the position offered.

Section 203(b)(3)(A)(i) of 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.

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program." "The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of Labor's Labor Market Information Pilot Program shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [Citizenship and Immigration Services (CIS)]." 8 C.F.R. § 204.5(d).

The regulations set forth in Title 20 of the Code of Federal Regulations also provide specific guidance relevant to the requirements that an employer must follow in seeking certification under Group I of Schedule A. An employer must file an application for a Schedule A labor certification with CIS. It must include evidence of prearranged employment for the alien beneficiary signified by the employer's completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.20(g)(3). 20 C.F.R. § 656.22(a) and (b).

The regulation at 20 C.F.R. § 656.22(c)(2) also 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 the 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.¹ Application for certification of employment as a professional nurse may

¹ On October 2, 2002, the Department of Labor advised the Service, now CIS, that because many states accept passage of the National Council Licensure Examination for Registered Nurses (NCLEX-RN), a state licensing examination, it planned to pursue conforming amendments to the regulations at 20 C.F.R. § 656.22(C)(2) and advised the Service that it may favorably

be made only pursuant to this §656.22(c), and not pursuant to §§ 656.21, 656.21a, or 656.23 of this part.

In this case, the immigrant visa petition was filed on August 27, 2001. The ETA 750-A accompanying the petition establishes that the position of registered nurse pays \$16.00 per hour for a position in California. The petitioner submitted a copy of the beneficiary's license to practice nursing in the State of New York. The director determined that the petitioner initially failed to submit sufficient evidence of its continuing ability to pay the proffered wage and had failed to submit documentation that the beneficiary had either passed the CGFNS examination or that she holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment.

On December 7, 2001, the director instructed the petitioner to provide evidence that the beneficiary has a baccalaureate degree or foreign equivalent degree and any accreditation degrees bestowed upon the beneficiary. The petitioner did not ask for evidence that the beneficiary had passed the CGFNS examination or that she holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment. The director also requested the petitioner to submit evidence that it has had the continuing ability to pay the proffered wage beginning as of the date of filing.

In response, counsel submitted the beneficiary's certificate of graduation in nursing from [REDACTED] located in Seoul, Korea, a transcript of courses taken, and a letter from the Executive Vice-President of the petitioner indicating that the petitioner had over 4,500 employed and revenues of \$16 million dollars.

In a second request dated January 18, 2002, the director requested that the petitioner submit evidence that the beneficiary has passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination and a full unrestricted license to practice nursing in the State of California. Despite the memorandum cited *supra* at note 1, permitting the substitution of the NCLEX-RN examination for the CGFNS examination, the director did not advise the petitioner that passage of this examination would be sufficient.

In response, counsel submitted a photocopied Temporary Registered Nurse License from the State of California issued in December 2001 and a letter informing the beneficiary that she must have a Social Security Number in order to receive a permanent nursing license in the State of California.

The director denied the petition, finding that the petitioner had failed to establish that the beneficiary has passed any licensure examinations or holds a full and unrestricted license to practice nursing in the state of intended employment. Once again, the director failed to discuss the NCLEX-RN examination. On appeal, counsel submits evidence that the beneficiary has a temporary license in California and that she has met all of the licensing requirements for permanent licensure except receipt of a social security number. Counsel further asserted that the NCLEX-RN examination is required for licensure in New York. Counsel, however, failed to provide evidence of the beneficiary's score on that examination. Moreover, counsel provided no evidence that this examination is required for New York licensure. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, the petitioner has not overcome the director's basis for denying the petition.

Beyond the decision of the director, the regulations at 20 C.F.R. § 656.20(c) require the prospective employer in Schedule A labor certification cases to make certain certifications in the application for labor certification. CIS has the authority to review the petitioner's proffered wage for compliance with 20 C.F.R. § 656.20 and, thus, with the Department of Labor's (DOL) prevailing wage rates. See 20 C.F.R. § 656.22(e). DOL maintains a website at

consider an I-140 petition for a foreign nurse for Schedule A labor certification if a certified copy of a letter from the state of intended employment is submitted showing that the alien has passed the NCLEX-RN examination. See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Adjudications, *Adjudication of Form I-140 Petitions for Schedule-A Nurses Temporarily Unable to Obtain Social Security Cards* (December 20, 2002).

www.ows.doleta.gov which provides access to an Online Wage Library (OWL), www.flcdcenter.com. OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically.² The prevailing wage rates are broken down into two skill levels. According to General Administration Letter (GAL) 2-98 (DOL), "DOL Issues Guidance on Determining OES Wage Levels" and Training and Employment Guidance Letter (TEGL) No. 5-02 (DOL) provide guidance on appropriate skill level categorization. The occupation and corresponding job description in this case indicate that it is a Level 1 position because the proffered position of nurse will report to a supervisor and is an entry-level position not requiring any years of experience or training. OWL reports that for 2001, the year of the petition's priority date, the prevailing wage rate for a Level 1 nursing position was \$19.72 per hour. The proffered wage for the position is \$16.00, which is less than the prevailing wage. While DOL regulations allow for the proffered wage to come within 95% of the prevailing wage, the instant petition's proffered wage does not fall within that threshold. See 20 C.F.R. § 656.40(a)(2)(i). Thus, the petitioner is not offering the prevailing wage rate and the petition cannot be approved for this reason.

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.

² The city, state, and county of the employment location must be known in order to identify the prevailing wage rate.