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U.S. Citizenship
and Immigration
Services



File: EAC 02 265 50820 Office: VERMONT SERVICE CENTER

Date: SEP 07 2008

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 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

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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 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, Schedule A, Group I. The director determined that the evidence submitted does not demonstrate that the notice of filing the Application for Alien Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3). The director also determined that the evidence does not demonstrate that the beneficiary is qualified for the Schedule A designation.

On appeal, counsel submits a brief.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), 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 or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. This section also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as a skilled worker (registered nurse). Aliens who will be employed as nurses are listed on Schedule A. Schedule A is a list of occupations found at 20 C.F.R. § 656.10. The Director of the United States Employment Service has determined that an insufficient number of United States workers are able, willing, qualified, and available to fill the positions available in those occupations, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

The regulation at 20 C.F.R. § 656.10(a)(2) specifies 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 (Applications for labor certification for Schedule A occupations.) (b)(2) states that the Application for Alien Employment Certification form shall include "evidence that notice of filing the application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.20(g)(3) of this part."

The regulation at 20 C.F.R. 656.20(g)(3) states the following:

Any notice of the filing of an Application for Alien Employment Certification shall:

(i) state that applicants should report to the employer, not to the local Employment Service

office;

(ii) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity; and

(iii) State that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor.

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.

(Emphasis supplied.) In a memo dated December 20, 2002, the Office of Adjudications of the INS, now CIS, issued a memo instructing Service Centers to accept a certified copy of a letter from the state of intended employment stating that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) and is eligible to receive a license to practice nursing in that state **in lieu** of either having passed the CGFNS examination or currently having a license to practice nursing in that state.

As per 20 C.F.R. 656.22, an employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA 750 at Part A) in duplicate with the appropriate CIS office. The Application for Alien Employment Certification shall include:

1. Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.
2. Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

In this case, Form I-140 was filed on August 15, 2002. On February 25, 2003, the director requested that the petitioner submit evidence that notice of the position had been presented to a bargaining representative or posted in accordance with 20 C.F.R. § 656.20(g)(3). The director also requested that the petitioner submit evidence that the beneficiary has passed the CGFNS examination or holds an unrestricted license to practice nursing in the state of intended employment, or submit a certified letter from the state of intended employment stating that the beneficiary has passed the NCLEX-RN examination and is eligible to receive a state license to practice nursing.

In response, counsel submitted a letter, dated April 21, 2003, in which he admitted that the beneficiary had not yet passed the CGFNS examination or the NCLEX-RN examination and did not have a license to practice nursing in the state of intended employment. Counsel stated, however, that since 1997 the INS, now CIS, has allowed favorable adjudication of I-140 petitions for nurses without submission of evidence that the beneficiary has passed either the CGFNS or NCLEX-RN examination, and without evidence that the beneficiary holds a license to practice nursing in the state of intended employment. Counsel stated,

This is **not** to say that petitioner is claiming that petitioner is entitled to approval merely because [CIS] has previously granted these types of applications without the beneficiary possessing CGFNS or NCLEX, and that [CIS] must do so in this case. Rather, it is to point out that the petitioner has followed what appears to be [CIS] policy and considers this to be a change of current policy.

(Emphasis in the original.)

Counsel also submitted a "posting" labeled Exhibit 5. That undated document states that the petitioner was seeking alien labor certification for 64 aliens to work as registered nurses. In his letter of April 21, 2003, counsel stated that the document was posted "on the bulletin board on or about August 25, 2002" and remained there until September 29, 2002. Counsel also submitted advertisements for open house and open interview dates held by the petitioner.

On May 20, 2003, the Director, Vermont Service Center, issued a decision in this matter. The director observed that the petitioner had not provided evidence that the beneficiary had passed the CGFNS examination or had a license to practice nursing in the state of intended employment. The director also noted that the petitioner had not presented a certified copy of a letter from the state of intended employment stating that the beneficiary had passed the NCLEX-RN examination and was eligible to receive a nursing license in that state. In addition, the director stated that the advertisements submitted "do not conform to the requirements of the notice of filing." Finally, the director noted that the petition in this matter was received on August 15, 2002, whereas counsel stated that the notice was posted on or about August 25, 2002. The director found that the petition was not, therefore, approvable on the date of filing and denied the petition.

On appeal, counsel asserts that the notice of filing was posted, not on or about August 25, 2002 as he previously asserted, but on July 15, 2002. Counsel states that the advertisements submitted were intended to show that the petitioner has a constant need for registered nurses. Counsel does not address the lack of any evidence that the beneficiary has passed the CGFNS examination, the lack of a letter showing that the beneficiary passed the NCLEX-RN examination, or the lack of any evidence that the beneficiary has a license to practice nursing in the state of intended employment.

Counsel states on appeal that the fact that the notice of filing the application for Alien Employment Certification contained no date confused the petitioner and caused it to report the wrong date. That explanation does not sufficiently explain how counsel allegedly came to misstate the date upon which the notice of filing was posted. His assertion, on appeal, that it was posted on a date different from the date he originally

stated is unconvincing. This office finds the evidence insufficient to show that the notice was posted prior to the date the I-140 was filed. A petitioner must establish that the petition was approvable at the time it was filed. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

The record contains no indication that the beneficiary has passed the CGFNS examination or the NCLEX-RN examination, and no evidence that the beneficiary holds a nursing license in the state of intended employment. Thus, the petitioner has not proven that the beneficiary is qualified for the position. Counsel previously asserted, in his letter of August 21, 2003, that requiring that evidence at this point in the petition process is a change of CIS policy. Even if it is, the Request for Evidence was sufficient notice of the change in policy, if any notice was necessary that CIS intended to enforce the regulations as written. Further, counsel made clear in his August 21, 2003 letter that he does not contend that this change in policy somehow renders the instant petition approvable.

The third basis for the director's decision of denial, that the advertisements submitted "do not conform to the requirements of the notice of filing," is unclear to this office. This office suspects that the director meant that the advertisements do not demonstrate that the petitioner made a good faith effort to locate a United States citizen to fill the proffered position. This office notes that, although such a showing is part of the basic labor certification process described at 20 C.F.R. § 656.21, it is not part of the application process for Schedule A occupations, described at 20 C.F.R. § 656.22.

Beyond the decision of the director, this office notes that the Notice of the Filing of the Application for Alien Employment Certification did not state, as it is required to do, that any person might provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor. As such, that notice did not comply with the requirement of 20 C.F.R. § 656.20(g)(3)(iii) and the petition should also have been denied on that ground.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center 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); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

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.