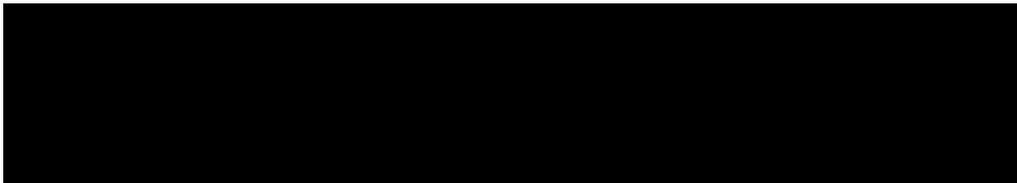


identifying documents to
prevent clear and present
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

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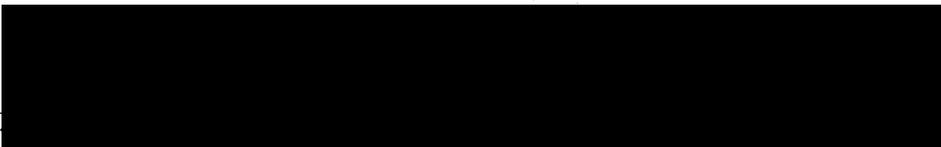
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Office: VERMONT SERVICE CENTER

Date: AUG 19 2005

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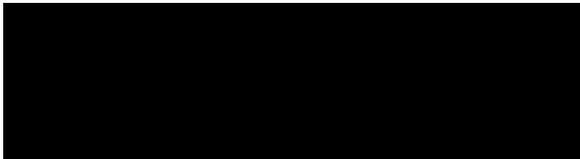
Petitioner:



Beneficiary:

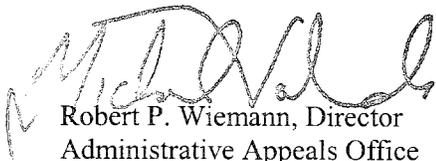
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a health care firm. It seeks to employ the beneficiary permanently in the United States as a registered nurse. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director denied the petition, finding the petitioner had not established either that the beneficiary was licensed or eligible for a license as a nurse in the state of intended employment, or that it had properly posted notice of the pending labor certification application with the correct information.

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.

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.

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,¹ including that proffered wage meets or exceeds the prevailing wage rate for the locale. The employment of aliens in Schedule-A occupations must not adversely affect the wages and working conditions of United States workers similarly employed. *See* 20 C.F.R. § 656.10. The regulations governing Schedule A do not contain any language that certifies that the employment of any alien registered nurse anywhere in the United States, at any wage or salary, would not adversely affect the wages and working conditions of U.S. workers similarly employed. That determination is left to CIS's jurisdiction under 20 C.F.R. § 656.22(e) which sets forth that CIS has authority to review a Schedule-A immigrant visa petitioner's satisfaction of labor certification requirements delineated under 20 C.F.R. § 656.20.

The regulation at 20 CFR § 656.22(b)(2) states that an application for labor certification for Schedule A occupations must include:

“Evidence that notice of filing the application for Alien Employment Certification was provided to the bargaining representative or the employer's employees”

Further 20 CFR § 656.20(g)(1)(ii) states that in cases where there is no bargaining representative, the notice requirement is satisfied by:

¹ Since Schedule A labor certifications are procedurally submitted directly to CIS and are not reviewed by the Department of Labor, CIS officers are authorized to determine the petitioner's compliance with the regulatory requirements governing Schedule A labor certification-based preference visa petitions. *See* 20 C.F.R. § 656.22(e).

“ . . . posted notice to the employer’s employees at the facility or location of employment. The notice shall be posted for at least 10 consecutive days. The notice shall be clearly visible and unobstructed while posted and shall be posted in conspicuous places, where the employer’s U.S. workers can readily read the posted notice on their way to or from their place of employment.”

The regulation at 20 C.F.R. § 656.20(c)(2) states that a labor certification application must clearly show that the wage offered meets the prevailing wage rate and references 20 C.F.R. § 656.40 (discussed above). Thus, a petition that fails to prove that its proffered wage does not adversely affect the wages and working conditions of United States workers similarly employed results in a denied visa petition. In other words, a petition that offers a salary that fails to meet the prevailing wage rate as determined by the Department of Labor (DOL) will be denied.

In this petition accompanied by a duplicate application for Schedule-A designation, the priority date is the date of receipt of the petition, January 13, 2004. In support of the petition, the petitioner submitted:

- A Form G-28;
- An unsigned Form ETA 750;
- Notice posting attestation of alien labor certification application; and,
- Academic and professional credentials.

In a request for evidence (RFE) dated May 13, 2004, the director asked for evidence of:

- The prevailing wages of registered nurses in the locale of Santa Rosa, California; and,
- The beneficiary having passed either the exam given by the Commission on Graduates of Foreign Nursing Schools (CGFNS), or by the National Council Licensure Examination for Registered Nurses (NCLEX-RN) with a letter from the state of intended employment confirming the beneficiary’s eligibility for licensure.²

In response to the RFE, the petitioner submitted:

- A CGFNS certificate dated January 9, 2004, verifying that the beneficiary had met all the requirements of the Act for the profession of registered nurse;
- The petitioner’s revised proffered wage offer of \$21.30 an hour, within 5 percent of the prevailing wage rate for Sonoma County, California;
- A copy of the state employment office’s report of the \$22.43 an hour prevailing wage rate for Sonoma and neighboring counties;
- A temporary California nurse’s license issued May 26, 2004, valid until November 26, 2004;
- A certificate from the Nevada State Board of Nursing confirming that the beneficiary had passed the National Council Licensure Examination for Registered Nurses (NCLEX) given August 27, 2003;
- A Nevada state board notice, dated September 3, 2003, declining to issue the beneficiary a nurse’s license for lack of a U.S. Social Security number;
- The beneficiary’s resume;
- A copy of the beneficiary’s Bachelor of Science Nursing degree dated July 7, 1999, from Manipal [India] Academy of Higher Education;
- The beneficiary’s transcript of grades for coursework at the said academy;

² The RFE noted that a letter confirming the beneficiary’s passage of the registered nurse’s exam must come from the state of intended employment.

- The beneficiary's July 14, 1999 certificate of having passed the Bangalore State of Karnataka examination for registered nurses;
- A September 3, 2002 attestation that the beneficiary had worked as a senior staff nurse at an Indian hospital since January 12, 2002;
- An August 8, 2001 certificate that the beneficiary had worked at a Bangalore, India, hospital as a staff nurse in cardiac surgery unit from July 15, 1999, to August 2, 2001; and,
- A July 3, 1999 certificate stating the beneficiary completed a six-month internship in the general surgery and neurological Intensive Care Unit at a Manipal hospital as of June 30, 1999.

In a decision dated September 23, 2004, the director determined the January 9, 2004 CGFNS certificate to be untimely as "earned after the filing of this petition," and therefore any reference to the beneficiary's passing the CGFNS exam would effect a material change to the petition already filed. Further, the director found the petitioner had posted a notice of labor certification application with a proffered wage below the prevailing minimum wage for the area. He therefore denied the petition.

On appeal, counsel submits a brief and additional evidence.

Counsel states on appeal that the director erred in requiring a letter from the state of California board of nursing showing the beneficiary had passed the NCLEX-RN test given in Nevada; that subsequent to filing the petition, the beneficiary acquired a permanent registered nurse's license; that on July 26, 2004, the petitioner cured its job posting previously posted and listing a rate below the local prevailing rate for registered nurses.

On appeal counsel submits:

- A July 26, 2004 certification of posting at the petitioner's Santa Rosa, California, headquarters by the petitioner with a \$22.43 rate of salary;
- The front of a California registered nurse license that expires November 30, 2005;
- A January 9, 2004 certificate from the International Commission on Healthcare Professions, a division of the Commission on Graduates of Foreign Nursing Schools GFNS, Philadelphia, PA, certifying the beneficiary has met all the requirements of 8 C.F.R. § 212.15(f) for registered nurse;
- A CIS receipt certifying that the petitioner had filed a Form I-129 on behalf of the beneficiary for an H-1B visa; and,
- A November 14, 2003 letter from a San Francisco-based ELS Language Centers in support of reinstatement of the beneficiary's F-1 student visa status showing enrollment t in study from July until October 16, 2003.

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.

At the outset, this office notes that the director found that the record of the proceeding included a CGFNS certificate "earned after the filing of this petition." To the contrary, the January 9, 2004 certificate predates the January 13, 2004 filing date of the petition. Accordingly, the petitioner established that the beneficiary is qualified for Schedule-A designation.

The director correctly found the petitioner had not submitted evidence of posting of the notice as required for Schedule-A designation, instead posting a notice specifying a wage of \$20 an hour. In response to a May 13, 2004 RFE, the petitioner on August 4, 2004, offered to raise the wage to within 5 percent of the amount determined to be the local prevailing wage, and subsequently posted a corrected notice. Nonetheless, the director, citing *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971), found that the correction notice made August 4, 2004, amounted to a material change in the petition.

While this petition will be dismissed, and though the petitioner cannot revive the petition by curing its notice defects, the petitioner is also not precluded from filing a new petition under the same labor certification after correcting the posting.

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. The petition is denied.