U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: EAC-02-173-51960 Office: VERMONT SERVICE CENTER Date: JAN 2 6 2005

IN RE: Petitioner: [redacted]
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:

[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 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 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 qualifies for an occupation listed in Schedule A, Group I.

On appeal, the petitioner states that the grounds on which the director denied the petition are grounds relevant only to adjudications of immigrant visa applications or adjustment of status applications, and are not grounds which may be considered when adjudicating the I-140 petition.

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. 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.

Employment-based petitions depend on priority dates. The priority date for Schedule A occupations is established when the I-140 is properly filed with CIS. 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 of the petition in this case is April 24, 2002.

The proffered wage as stated on the Form ETA 750 is $15.40 per hour, which amounts to $32,032.00 annually. On the Form ETA 750B, signed by the beneficiary on January 18, 2002, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1978, to have a gross annual income of $226,387,000, to have net annual income of $11,757,000, and to currently have 1,300 employees.

In support of the petition, the petitioner submitted a copy of the beneficiary's diploma showing a degree of Bachelor of Science in Nursing granted on March 29, 1999 by De La Salle University – Dasmarinas, Dasmarinas, Cavite, Philippines, with accompanying course transcript; a copy of the beneficiary's registered nurse license card issued by the Philippines Professional Regulation Commission, with registration date of June 21, 1999; and a copy of the beneficiary's registered nurse license issued by the Philippines Professional Regulation Commission on June 21, 1999.

The director found the evidence to be insufficient concerning several issues. In a request for evidence (RFE) dated September 19, 2002, the director requested evidence that notice of filing the application for alien employment certification was provided to the bargaining representative of the employees or to the employees, evidence that the beneficiary had passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment, and evidence that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. In accordance with 8 C.F.R.

§ 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director stated that in a case where the prospective employer employs 100 or more workers, a statement from a financial officer of the organization may be accepted. The RFE stated a deadline of December 15, 2002 for the petitioner's response.

In response to the RFE, counsel submitted a letter dated December 5, 2002 requesting an additional 60 days to gather the materials requested. That letter was received by CIS on December 12, 2002.

Counsel later submitted a letter dated January 31, 2003 and the following documents: a copy of section 212(a)(5)(C) of the Immigration and Nationality Act; a copy of section 204.5 of Title 8 of the Code of Federal Regulations; a copy of a memorandum from the Office of Examinations of the Immigration and Naturalization Service, dated in 1997, but with part of the date illegible; a copy of a cable dated December 1996 from the Department of State; and a copy of a letter dated December 23, 2002 from the petitioner's director of finance, with attached audited financial statements of the petitioner for the years ending June 30, 2001 and June 30, 2002. Counsel's letter and attached documents were received by CIS on February 5, 2003.

In a decision dated April 10, 2003, the director noted that the regulation at 8 C.F.R. § 103.2(b)(8) states that 12 weeks are allowed for an applicant or petitioner to respond to an RFE and that additional time may not be granted. The director determined that the evidence in the record did not establish that the beneficiary qualifies for an occupation listed in Schedule A and did not establish that notice of filing the application for alien employment certification was provided to the bargaining representative of the employees or to the employees. The director therefore denied the petition.

On appeal, counsel submits a brief and the following documents: a copy of a notice of position availability dated October 6, 2002 and duplicate copies of some of the documents submitted previously. One of the duplicate copies is a copy of the 1997 memorandum mentioned above from the INS Office of Examinations, the initial copy of which has a partially illegible date. The copy submitted on appeal shows the date of that memorandum to be January 28, 1997.

Counsel states on appeal that at the time of the director's decision on the I-140 petition the beneficiary had not yet passed the CGFNS examination and did not hold a full and unrestricted license to practice nursing in the state of intended employment. Counsel states that the beneficiary is nonetheless eligible for Schedule A classification. Counsel states that in adjudicating the I-140 petition the director improperly required evidence on matters which are relevant to an application for an immigrant visa or an application to adjust status to permanent residence, but which are not relevant to the I-140 petition. Counsel further states that the Vermont Service Center had a previous practice of adjudicating I-140 petitions without requiring such evidence and that Citizenship and Immigration Services (CIS) may not change such a policy without notice to the public.

In considering the instant appeal, the initial question is whether the instant appeal is properly before the AAO. The procedural history summarized above indicates that the instant appeal is not one permitted by the regulations.

The RFE stated a deadline of December 15, 2002 for the petitioner's response. That date was 12 weeks from the date of the RFE, a period specified by regulation. 8 C.F.R. § 103.2(b)(8). The applicable regulation also states, "Additional time may not be granted." *Id.* The RFE also included statements informing the petitioner that submissions received after the deadline date would not be accepted and that no extension of time could be granted to submit the requested documentation.

In response to the RFE, counsel submitted a letter dated December 5, 2002 requesting an additional 60 days to gather the materials requested, a letter received by CIS on December 12, 2002.

The deadline of December 15, 2002 as stated on the RFE fell on a Sunday, therefore by regulation the petitioner's response was due on December 16, 2002. *See* 8 C.F.R. § 1.1(h). The response consisted of counsel's letter dated January 31, 2003 and attached documents as described above. The petitioner's response to the RFE was received by CIS on February 5, 2003, which was 51 days after December 16, 2002.

The regulation at 8 C.F.R. § 103.2(b)(13) states in pertinent part, "If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied."

Notwithstanding the foregoing regulatory language, the director issued a decision which made no finding of abandonment, but which denied the petition on the grounds that the evidence did not establish that the beneficiary qualifies for an occupation listed in Schedule A and did not establish that notice of filing the application for alien employment certification was provided to the bargaining representative of the employees or to the employees.

On appeal, counsel submits a brief, one new evidentiary document, and duplicate copies of some of the documents submitted previously, as listed above.

The foregoing procedural history indicates that the instant appeal is not one which is permitted by the regulations. As stated above, the petitioner's response to the RFE was not submitted within the 12-week period specified by the regulations. Under such circumstances, the applicable regulation states, "the application or petition *shall be considered abandoned* and, accordingly, shall be denied." 8 C.F.R. § 103.2(b)(13) (emphasis added). The regulatory language allows no discretion to the director to accept evidence submitted after the required date, nor to issue a decision on the merits of a petition based on such evidence. Therefore, the director erred in issuing a decision based on grounds relating to the merits of the petition.

For the foregoing reasons, the petition must be considered abandoned. Furthermore, the regulation at 8 C.F.R. § 103.2(b)(15) states in pertinent part, "A denial due to abandonment may not be appealed, but an applicant or petitioner may file a motion to reopen under § 103.5."

Since the regulations require a finding of abandonment in the instant case, and since the regulations do not allow an appeal of a denial due to abandonment, the instant appeal is not properly before the AAO. Accordingly, the appeal must be dismissed.

Because the appeal will be dismissed under 8 C.F.R. § 103.2(b)(13) and (15), it is not necessary to evaluate the evidence in the record. Nonetheless, in order to provide the petitioner and the director with guidance on the AAO's views on the legal issues raised by this case and on the evidence submitted by the petitioner relevant to those issues, the AAO will evaluate the director's decision in light of the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then also be discussed.

In order to establish the beneficiary's eligibility under the instant petition, the petitioner must demonstrate that on the filing date of the petition the beneficiary had the qualifications stated on the Form ETA 750 Application for Alien Employment Certification which was submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition was filed on April 24, 2002. The Form

ETA 750 specifies that the position requires a bachelor's degree in nursing and licensure as a registered nurse in the same country where the degree was obtained. The petitioner must also demonstrate that as of April 24, 2002 the beneficiary possessed the qualifications imposed by the regulations.

Both the petition and the Form ETA 750 state that the petitioner will employ the beneficiary in Monroeville, Pennsylvania. The State of Pennsylvania does not require completion of a bachelor's degree as a condition of obtaining a license as a registered nurse. The regulations of the Pennsylvania State Board of Nursing allow for associate's degree programs and for diploma programs, as well as for bachelor's degree programs, to satisfy the educational requirements for a license as a registered nurse. *See* The Pennsylvania Code, Chapter 21, State Board of Nursing, Subchapter A, Registered Nurses, §§ 21.31 to 21.89, http://www.pacode.com/secure/data/049/chapter21/chap21toc.html (accessed December 20, 2004).

Definitions of skilled workers and of professionals for purposes of immigrant petitions are found in the regulation at 8 C.F.R. § 204.5(l)(3) which states, in pertinent part:

> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.
>
> (C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

Since completion of a bachelor's degree is not required in Pennsylvania to obtain a registered nurse license, a registered nurse does not qualify as a professional under the regulatory definition of that term. Even a nurse holding a bachelor's degree would not qualify as a professional under the regulations, since a minimum of a baccalaureate degree is not required for entry into the occupation of registered nurse. The instant petition therefore will be evaluated as a petition for a skilled worker.

The regulation at 20 C.F.R. § 656.10(a)(2) states that an alien may qualify for Schedule A designation as a nurse if the person has passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or if the person holds a full and unrestricted license to practice nursing in the state of intended employment.

Similarly, the regulation on applications for labor certification for Schedule A occupations at 20 C.F.R. § 656.22 (c)(2) states, in pertinent part,

> 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.

A memorandum dated December 20, 2002 from Thomas Cook, Office of Adjudications, INS (now CIS), added an additional examination as an acceptable criteria for Schedule A certification. The memorandum instructed 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.

With the instant petition, counsel submitted a letter dated February 13, 2002 in which counsel states that he is attaching the beneficiary's CGFNS documents, as well as other documents. However, none of the documentation submitted with the petition pertains to the CGFNS.

In his letter dated January 31, 2003 in response to the RFE, counsel states that the beneficiary has not yet passed the CGFNS examination and does not yet hold a full and unrestricted license to practice nursing in the state of intended employment. Counsel asserts, however, that those qualifications are not applicable to the adjudication of the I-140 petition, but rather, pertain to criteria for admissibility, which will be adjudicated at the time the beneficiary applies for an immigrant visa, based on an approved I-140 petition. In his brief on appeal, counsel again asserts that matters pertaining to the CGFNS examination and to the alternative criteria of the beneficiary's licensure to practice nursing in the state of the intended employment are matters which are not relevant to the adjudication of the I-140 petition.

In support of his statements, counsel submits a copy of Section 212(a)(5)(C) of the Immigration and Nationality Act; a copy of section 204.5 of Title 8 of the Code of Federal Regulations; a copy of a memorandum dated January 28, 1997 from the Office of Examinations of the Immigration and Naturalization Service; and a copy of a cable dated December 1996 from the Department of State.

Section 212(a)(5) of the Immigration and Nationality Act provides that "any alien who seeks to enter the United States for the purpose of performing labor as a health-care worker, other than as a physician, is excludable" unless the alien presents evidence of having received a certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS) or from "an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of Health and Human Services." Any such certificate must verify that the alien's education, training and experience meet legal requirements for entry into the United States and are comparable to that required for an American health care worker. Such a certificate must also verify that the alien has a sufficient command of English and that the alien has passed an examination given by the certifying agency. The regulatory details for health care worker certificates are found at 8 C.F.R. § 212.15(f).

Certain nurses may obtain an alternative certificate under INA § 212(r) if they are graduates of nursing programs where the primary language of instruction was English and which are located in certain designated countries, and if the beneficiaries meet other requirements. The regulatory details on alternative certificates under INA § 202(r) are found at 8 C.F.R. § 212.15(h).

In the instant case, counsel's statements pertaining to the CGFNS certificates refer to certificates issued pursuant to INA § 212(a)(5)(C), as discussed above. Counsel asserts that by requiring evidence of passing the CGFNS examination as part of the I-140 adjudication, the director improperly adjudicated the beneficiary's excludability under INA § 212(a)(5)(C).

Counsel's statements fail to distinguish between a CGFNS certificate and the CGFNS examination. Passing the CGFNS examination does not guarantee that a CGFNS certificate will be issued, since the CGFNS examination

is only one of several elements which are required for the issuance of a CGFNS certificate. *See* INA § 212(a)(5)(C).

Notwithstanding counsel's assertions, the applicable Department of Labor regulations do not require an adjudication of the beneficiary's excludability as part of the evaluation of whether the beneficiary qualifies for Schedule A designation as a nurse. The regulation at 20 C.F.R. § 656.22 (c)(2) does not require evidence that the beneficiary holds a CGFNS certificate, but only evidence that the alien "has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination," or evidence that the alien holds a nursing license in the state of intended employment at the time of the filing of the application for labor certification.

In addition to the criteria specified in the regulations at 20 C.F.R. §§ 656.10(a)(2) and 656.22(c)(2), the memorandum dated December 20, 2002, from Thomas Cook of the Office of Adjudications has added an additional examination, the National Council Licensure Examination for Registered Nurses (NCLEX-RN), as an acceptable criteria to evaluate whether the beneficiary qualifies for Schedule A designation.

In the instant case, the record contains no evidence indicating that the beneficiary has passed the CGFNS examination or the NCLEX-RN examination, and no evidence indicating that the beneficiary holds a license to practice nursing in Pennsylvania. Lacking such evidence, the record fails to establish that the beneficiary is qualified for Schedule A designation. *See* 20 C.F.R. § 656.10(a)(2). A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing. A petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel asserts in his brief that the Vermont Service Center has in the past approved I-140 petitions for nurses without requiring evidence that the beneficiary has passed the CGFNS examination or evidence that the beneficiary holds a license to practice nursing in the state of intended employment. Counsel asserts that the memorandum of December 20, 2002 from the Office of Adjudications changed CIS policy with regard to such evidence and that such a change may not be made without notice to the public. As evidence of the prior policy, counsel submits a copy of a memorandum dated January 28, 1997 from the Office of Examinations of the Immigration and Naturalization Service and a copy of a cable dated December 1996 from the Department of State. Each of those documents discusses the implementation of the statutory requirement for intending health care workers of obtaining a CGFNS certificate, a requirement which had been recently added to the INA when those documents were prepared. The January 28, 1997 memorandum from the Office of Examinations instructs field offices adjudicating I-140 petitions not to consider the newly-added ground of exclusion as part of an I-140 adjudication. The December 1996 Department of State cable makes no reference to the adjudication of I-140 petitions.

The AAO does not find counsel's assertions regarding past practices in the Vermont Service Center to be persuasive. Each petition filed is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In determining eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. §103.2(b)(16)(ii). If previous immigrant visa petitions have been erroneously approved under some prior interpretation of the law without regard to the alien's qualifications for a labor certification under the Schedule A, Group I procedures set forth in the applicable regulations, that fact would not mandate future approvals. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International,* 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency is required to treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. V. Montgomery,* 825 F.2d 1084 1090 (6th Cir. 1987), *cert denied,* 485 U.S. 1008 (1988). It is also noted that the AAO's authority over a

service center is similar to that of a court of appeals' authority over a district court. Even if a service center director had previously approved immigrant petitions on behalf of other similarly unqualified beneficiaries, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS,* 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied,* 534 U.S. 819 (2001).

To the extent that the January 28, 1997 memorandum from the Office of Examinations is inconsistent with the December 20, 2002 memorandum from Thomas Cook of the Office of Adjudications, the 1997 memorandum is superceded by the 2002 memorandum. Moreover, the Department of Labor regulations quoted above give the public adequate notice of the standards for Schedule A designation.

Counsel asserts that the petitioner has incurred substantial costs in reliance on the previous policy of the Vermont Service Center. Even if the AAO were to assume that counsel's assertions on those matters are true, the AAO would have no authority to consider claims based on the petitioner's reliance on a previous policy. The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv).

Another issue raised by the evidence concerns whether notice of filing the application for alien employment certification was provided to the bargaining representative of the employees or to the employees. In the RFE, the director requested evidence pertinent to that issue, but counsel submitted no evidence on that issue prior to the director's decision.

The evidence in the record prior to the director's decision fails to establish that notice of filing the application for alien employment certification was provided to the bargaining representative of the employees or to the employees. The evidence therefore fails to satisfy the requirements of 20 C.F.R. § 656.22(b)(2).

In his decision, the director found that the evidence failed to establish that the beneficiary had passed the CGFNS examination or the NCLEX-RN examination, or that the beneficiary held nursing license in the state of intended employment. The director therefore determined that the evidence did not establish that the beneficiary qualifies for an occupation listed in Schedule A, Group I (Title 20, Code of Federal Regulations, part 656). This finding by the director was correct, for the reasons discussed above. The director also found that no evidence had been submitted to show that notice of filing the application for alien employment certification was provided to the bargaining representative of the employees or to the employees. This finding of the director was also correct. The decision of the director to deny the petition was therefore correct, based on the evidence in the record prior to the director's decision.

On appeal, counsel submits for the first time a copy of a notice of position availability dated October 6, 2002, along with duplicate copies of some of the documents submitted prior to the director's decision. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the director.

As discussed above, the petitioner's late response to the RFE requires a finding that the instant petition has been abandoned. A denial of a petition based on abandonment may not be appealed. But even when appeals are properly taken, significant restrictions exist concerning evidence offered on appeal.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

> Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the issue of whether the petitioner gave notice to its employees of the filing of an application for alien employment certification (Form ETA-750, parts A & B). The petitioner was put on notice of the need for evidence on that issue by the regulations at 20 C.F.R. § 656.22(a) and (b), and § 656.20(g)(1), which are quoted in relevant part above. In addition to the regulations, the petitioner was put on notice of the need for evidence on that issue by published decisions of the AAO and its predecessor agencies. Moreover, in the instant case, the petitioner was put on notice by the RFE issued by the director of the need for evidence relevant to that issue. For the foregoing reasons, the evidence submitted for the first time on appeal would be precluded from consideration by *Matter of Soriano*, 19 I & N Dec. 764, even if the appeal were properly before the AAO.

Nonetheless, even if the appeal and the evidence submitted for the first time on appeal were properly before the AAO, that evidence would fail to overcome the decision of the director.

The evidence newly submitted on appeal consists of a copy of a notice of position availability, containing a stated posting date of October 6, 2002. That notice fails to satisfy the regulatory requirements of giving notice to the petitioner's employees or to their appropriate bargaining representative of the filing of an application for alien employment certification.

The regulation at 20 C.F.R. § 656.22 states, in pertinent part:

> (a) An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification . . . with the appropriate [CIS] office . . .
>
> (b) The Application . . . 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. . . . [and]
>
> (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 § 656.20(g)(3) of this part.

The foregoing cross reference to § 656.20(g)(3) is apparently erroneous, and apparently should read "as prescribed in § 656.20(g)(1) of this part.".

The regulation at 20 C.F.R. § 656.20(g)(1) states,

> In applications filed under Sec. Sec. 656.21 (Basic Process), 656.21a (Special Handling) and 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:

> (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment.
>
> (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the 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. Appropriate locations for posting notices of the job opportunity include, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

In the instant case, the notice of position availability contains the words "POSTED: 10/06/2002," but the notice contains no indication of the location of any posting nor the length of any posting. Nor does any other evidence in the record provide that information. Also, neither the notice nor any other evidence in the record indicates that information on the filing of the application for alien labor certification was provided to the appropriate bargaining representative, if any, of the petitioner's employees in the area of the intended employment. The notice therefore fails to satisfy the requirements of the regulation at 20 C.F.R. § 656.20(g)(1).

The notice of position availability also lacks information required by the regulations.

The regulation at 20 C.F.R. §656.20(g)(8) states, "If an application is filed under the Schedule A procedures at Sec. 656.22 of this part, the notice shall contain a description of the job and rate of pay, and the requirements of paragraphs (g)(3) (ii) and (iii) of this section."

The regulation at 20 C.F.R. § 656.20(g)(3) states,

> 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.

In the instant case, the notice of job availability fails to state the rate of pay, as required by 20 C.F.R. § 656.20.(g)(8), fails to 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, as required by 20 C.F.R. § 656.20(g)(3)(ii), and fails to state that any person may provided documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor, as required by 20 C.F.R. § 656.20(g)(3)(iii).

For the foregoing reasons, even if the appeal and the evidence newly submitted on appeal were properly before the AAO, that evidence would fail to overcome the decision of the director.

Beyond the decision of the director, the evidence in the record raises the issue of the beneficiary's qualifications for the offered position.

The Form ETA 750 states in block 14 that the minimum education for the offered position is a "BSN," which is the abbreviation for a bachelor of science in nursing. The record contains a copy of the beneficiary's diploma showing a degree of Bachelor of Science in Nursing granted on March 29, 1999 by De La Salle University – Dasmarinas, Dasmarinas, Cavite, Philippines, with accompanying course transcript. The transcript indicates that the beneficiary's diploma represents four years of full-time study. However, the record lacks an educational evaluation of whether the beneficiary's bachelor's degree is equivalent to a United States bachelor's degree.

The Form ETA 750 provides no criteria by which to evaluate a beneficiary's foreign education for equivalency to a United States bachelor's degree. As discussed above, the instant petition is being evaluated as a petition for a skilled worker. Even though the ETA 750 requires a bachelor's degree, a beneficiary under the ETA 750 could not qualify as a professional, since a bachelor's degree is not required for the occupation of registered nurse. *See* 8 C.F.R. § 204.5(l)(3)(C).

The regulatory definition of skilled workers contains no language specifying an equivalence to a United States bachelor's degree. *See* 8 C.F.R. § 204.5(l)(3)(B). Such an equivalence is found in the definition of professional: "If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree *or a foreign equivalent degree* . . . ." 8 C.F.R. § 204.5(l)(3)(C). But since the definition of a professional is not applicable to the instant petition, and since the ETA 750 itself provides no criteria with which to evaluate foreign education, the record lacks a sufficient basis for an evaluation of whether the beneficiary's foreign degree satisfies the requirements of the ETA 750. In light of the discussion above of the other reasons why the petition must be denied, it is not necessary to consider further the issue of evaluating the beneficiary's foreign education.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As discussed above, because of the petitioner's late submission of evidence in response to the RFE, the regulations require a finding that the petition has been abandoned, and a denial of the petition. 8 C.F.R. § 103.2(b)(13). A denial based on abandonment may not be appealed. 8 C.F.R. § 103.2(b)(15). But even if the regulations allowed a consideration of the merits of the instant appeal, the petitioner has not met its burden of proof.

ORDER: The appeal is dismissed.