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U.S. Citizenship
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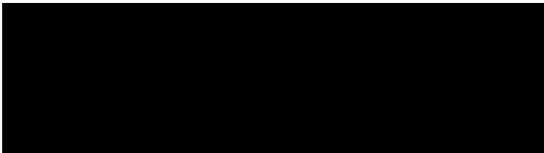


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **JUL 06 2005**
WAC 04 119 53803

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.

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 convalescent hospital and mental health rehabilitation center. 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 an accurate 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. § 656.20(g)(8) states, in pertinent part, "If an application is filed under the Schedule A procedures at §646.22 of this part, the notice will contain a description of the job and rate of pay"

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. § 656.22(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 Center 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.

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 Bureau of Citizenship and Immigration Services 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 March 19, 2004. Both the Form I-140 petition and the Form ETA 750 Application for Labor Certification state that the petitioner would employ the beneficiary in Santa Rosa, California, which is in Sonoma County. The wage proffered on the Form ETA 750 is \$20 per hour. Counsel also submitted a prevailing wage request form from the State of California Employment Development Department stating that the predominant wage for registered nurses in Sonoma County is \$22.43 per hour.

With the petition counsel submitted a posting of the proffered position, dated November 13, 2003. That posting states that the wage offered for the proffered position is \$800 for a 40-hour week, which equal \$20 per hour.

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 August 4, 2004, from the petitioner's president. That letter acknowledges that the prevailing wage for the proffered position in Sonoma County, where the petitioner would employ the beneficiary, is \$22.43 per hour, and states that the petitioner is amending the wage offered to the

beneficiary to \$21.30 per hour. The petitioner's president states that this amount is within five percent of the predominant wage in Sonoma County.¹

Counsel also submits a copy of a Temporary Registered Nurse License, issued to the beneficiary by the State of California on July 9, 2004. In a cover letter dated August 4, 2004, counsel states that this license permits the beneficiary to practice nursing in California.

On May 20, 2003, the Director, Nebraska 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 full and unrestricted license to practice nursing in California, 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. Finally, the director noted that the petitioner had not demonstrated that the job notice was posted in accordance with 20 C.F.R. § 656.20(g), as the notice did not correctly state the rate of pay.

On appeal, counsel addressed both issues.

As to the NCLEX, counsel noted that, in response to the May 13, 2004 Request for Evidence, the petitioner provided a copy of the beneficiary's California Temporary Registered Nurse License. Counsel states that the beneficiary had passed the NCLEX examination in Nevada before the Form I-140 petition was filed in this case, but provided no evidence in support of that assertion. Counsel stated that he believes that passing the NCLEX in a state other than the state of intended employment suffices under the regulations. Counsel also noted that the beneficiary now has the requisite California Registered Nurse License. Counsel provided a copy of that license. That copy indicates that it expires on June 30, 2006, but does not indicate the date upon which it was issued.

As to the issue of the proffered wage, counsel stated that the petitioner has now amended the proffered wage to within 5% of the predominant wage. Counsel further stated that he inadvertently omitted a copy of the revised posting of the proffered position, incorporating the amended wage. Counsel provided his own affidavit in support of that assertion. Counsel also provided a revised posting of the proffered position, dated July 26, 2004, stating that the wage offered for the position is \$22.43.

Counsel did not explain why, having revised the proffered wage to \$21.30, the petitioner posted a notice of the proffered position stating that the wage was \$22.43. Notwithstanding that the revised posting is dated July 26, 2004, and notwithstanding counsel's affidavit, this discrepancy raises the issue of whether that posting was actually prepared and posted at that time, prior to the submission of the August 4, 2004 response to the Request for Evidence, or if it was prepared at some later date to fulfill a perceived need for additional evidence.

Whichever wage the petitioner is now offering, the petitioner's attempt to amend the proffered wage after the submission of the petition and Form ETA 750 application in this matter is ineffective. One purpose of posting the proffered position is to locate available U.S. workers to fill the proffered position. In submitting

¹ In fact, 95% of \$22.43, rounded, is \$21.31. The amount to which the petitioner amended the proffered wage was still more than five percent lower than the predominant wage for the proffered position in the area of intended employment.

the Form ETA 750 and supporting documentation, the petitioner is representing that it was unable, despite a diligent search, to locate U.S. workers to fill the position. That representation is unconvincing in the instant case, where the petitioner has admitted that it advertised the proffered position at a wage substantially less than the predominant wage for similar positions.

The regulations require the proffered position to be posted for ten days prior to the priority date. The petitioner is obliged to establish eligibility at the time of filing. A petition cannot be approved at a later date after a petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971). For this reason, the attempt by counsel and the petitioner, after the filing date, to revise the proffered wage to conform to the regulations does not render the petition approvable.

As to the remaining issue, this office notes that the petitioner is obliged to submit either (1) evidence that the beneficiary has passed the CGFNS examination, (2) evidence that the beneficiary holds a full and unrestricted license to practice professional nursing in the state of intended employment, or (3) a certified copy of a letter from the state of intended employment stating that the beneficiary has passed the NCLEX-RN examination and is eligible to receive a license to practice nursing in that state. Further, as per *Matter of Katigbak, supra*, the evidence submitted must establish that the beneficiary was eligible on the filing date, rather than becoming eligible for the proffered position at some later date.

Counsel has submitted no evidence pertinent to the CGFNS examination. Counsel submitted the beneficiary's unrestricted nursing license, but without any evidence, or even the assertion, that it was issued prior to the March 19, 2004 filing date. That counsel submitted a temporary license previously seems to imply that the beneficiary did not, in fact, have a permanent license to practice nursing in California on the filing date.

Counsel asserts that the petitioner passed the NCLEX-RN examination prior to the filing date, but submits no evidence in support of that assertion. In any event, only one type of evidence in support of that assertion would be acceptable. The December 20, 2002 memo instructing Service Centers to accept evidence of passage of the NCLEX-RN examination in lieu of passage of the CGFNS or a current full and unrestricted license makes clear that the requisite evidence of NCLEX-RN passage is a certified copy of a letter from the state of intended employment stating that the beneficiary has passed examination and is eligible to receive a license to practice nursing. That evidence demonstrates that the state of intended employment has examined the beneficiary's evidence and found it sufficient to qualify for a license in that state. Even if counsel had submitted evidence, rather than merely alleging, that the beneficiary passed the NCLEX-RN prior to the filing date, unless that evidence was the described letter, it would have been insufficient.

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.