

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B 6

[REDACTED]

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date:

JUN 14 2005

LIN 03 082 52337

IN RE:

Petitioner:

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:

[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, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a nursing service. 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(a), commonly referred to as Schedule A. The director determined that the petitioner had not established that the beneficiary met the qualifications for Schedule A designation and denied the petition accordingly.

On appeal, counsel submits a statement and additional evidence.

Section 203(b)(3) of the Act states, in pertinent part:

(A) In general. - Visas shall be made available . . . to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals. - Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Furthermore, 8 CFR § 204.5(l)(3)(ii) 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 of 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 that the minimum of a baccalaureate degree is required for entry into the occupation.

The regulation at 20 C.F.R. § 656.10(a)(2) states 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.] (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.

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.

Eligibility in this matter hinges on the petitioner demonstrating that, on the filing date of the petition, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition was filed on January 15, 2003. The Form ETA 750 specifies that the position requires an associates degree in nursing. The petitioner must also demonstrate that, as of January 15, 2003, the beneficiary possessed the qualifications imposed by the regulations.

With the petition counsel submitted no evidence that the alien had passed the CGFNS examination; no evidence that the alien held a full and unrestricted (permanent) license to practice nursing in Indiana, the State of intended employment, and no letter from the State of Indiana stating that the beneficiary had passed the NCLEX-RN examination and was eligible to receive a license to practice nursing in that state. In a cover letter, dated January 13, 2003, counsel stated, "The beneficiary is in the process of obtaining CGFNS certification"

On September 12, 2003, the Nebraska Service Center requested additional evidence. Specifically, the Service Center requested, *inter alia*, evidence that the beneficiary has passed the CGFNS examination or holds an Indiana license to practice nursing.

Although counsel responded to that notice, providing evidence pertinent to other issues that did not form the basis for the subsequent decision of denial, counsel submitted no evidence that the beneficiary has passed the CGFNS examination; no evidence that the alien holds a license to practice nursing in Indiana, and no letter from the State of Indiana the beneficiary has passed the NCLEX-RN examination and is eligible to receive a license to practice nursing in that state. With his response counsel submitted a cover letter describing the evidence being provided. That cover letter makes no mention of evidence pertinent to CGFNS passage, NCLEX-RN passage, or an Indiana nursing license.

The director determined that the evidence submitted did not demonstrate the beneficiary's eligibility for the Schedule A designation and denied the petition on January 14, 2004.

On appeal, counsel provides a copy of a CGFNS certificate dated June 26, 2003. Counsel states that he previously provided that certificate on September 24, 2003, with his response to the Request for Evidence.

That certificate was not, however, submitted with the response to the Request for Evidence. The cover letter submitted with the response makes clear that it was not.

The regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8).

The petitioner was put on notice of required evidence and afforded a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 762 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

At that time the record contained no evidence that the beneficiary had passed the CGFNS examination; no evidence that the alien held a license to practice nursing in Indiana, and no letter from the State of Indiana stating that the beneficiary had passed the NCLEX-RN examination and was eligible to receive a license to practice nursing in that state. The record did not, therefore, demonstrate that the petition was eligible for blanket labor certification pursuant to 20 C.F.R. § 656.10(a), Schedule A.¹ The petition was not, therefore, accompanied by a valid labor certification and may not be approved.

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.

¹ If the certificate submitted on appeal were considered, it would show that the beneficiary's passage of the CGFNS examination was certified on June 26, 2003. That would not demonstrate that the beneficiary had passed the CGFNS examination on January 14, 2004, the priority date of the petition. That certificate would not, therefore, render the instant petition approvable.