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U.S. Citizenship
and Immigration
Services

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MAR 08 2005

FILE: EAC 02 195 52976 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the director of the Vermont Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The immigrant petition is denied.

The petitioner is a hospital. It seeks to permanently employ the beneficiary 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 denied the petition after determining that the petitioner had not established its ability to pay the proffered wage, and that the petitioner had not complied with regulatory criteria for labor certification, pursuant to 20 C.F.R. 656.22(b)(2) which states that the notice of filing the application for Alien Certification be provided to the bargaining representative or the petitioner's employees.

On appeal, counsel states that the petitioner already submitted evidence of its ability to pay the proffered wage based on a letter submitted from the petitioner's vice president of administration with regard to the number of persons employed by the beneficiary and its ability to pay the proffered wage. Counsel resubmits the letter.

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 filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse on April 24, 2002. Aliens who will be permanently employed as professional nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.10 for which the Director of the United States Employment Service has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed. Also, according to 20 C.F.R. § 656.10, aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, or (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment.

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. Pursuant to 20 C.F.R. § 656.22, 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).

With the initial petition, the petitioner provided copies of the beneficiary's academic credentials and license to practice nursing in the Philippines. Because the evidence was insufficient to adjudicate the petition, the director issued a request for evidence on November 5, 2002, requesting the petitioner's posting notice pursuant to 20 C.F.R. §

656.20(g)(1), and proof of the beneficiary's passage of the CGFNS examination or an unrestricted license to practice nursing in the state of intended employment, pursuant to 20 C.F.R. § 656.10. In addition, the director requested further evidence that the petitioner was capable of paying the proffered wage. The director stated that the petitioner could submit its 2001 federal income tax return with all schedules and attachments, it is audited annual report for 2001, or a statement from a financial officer that established its ability to pay the proffered wage.

In a letter dated January 28, 2003, counsel, in response to the request for proof of the beneficiary's qualifications, stated the following:

[The b]eneficiary does not yet have these requirements. However, despite not having them, [the] beneficiary remains qualified for issuance of an approval of the application for an approved I-140.

The reason is that the [Immigration & Nationality Act] and [CIS] regulations do not require that the beneficiary present CGFNS, the visa screen, TWE, TSE, or TOEFL prior to an appearance at either the Consulate where the beneficiary is being interviewed for issuance of an immigrant visa, or at [a CIS] office during an adjustment interview.

Counsel stated, in part, that the beneficiary does not need to produce proof of a CFGNS certificate, state license, or verification of passing the NCLEX-RN examination because Citizenship and Immigration Services (CIS) and its predecessor service approved other cases without them at the visa petition stage and only required proof of the beneficiaries' qualifications when consular processing as lawful permanent residents prior to entering the United States.

Counsel referenced sections 212(a)(5)(C) of the Act and 8 C.F.R. § 204.5 for the proposition that submitting proof of the beneficiary's CGFNS certificate or license was only a ground of inadmissibility during consular processing or adjustment of status and not a requirement at the I-140 stage. Counsel also referenced a CIS memorandum dated January 28, 1997 from the Office of Examinations as well as a cable of instructions issued by the Secretary of State in December 1996. Finally counsel stated that the guidance provided in the documents submitted into the record has not been changed. Counsel submitted a posting notice for four assistant nurse managers in New York, New York, that is submitted on blank paper. Counsel also submitted a letter dated January 29, 2003 from [REDACTED] Vice President, Administration, Huntington Hospital, Huntington, New York. This letter stated the petitioner has 1,749 employees and has the ability to pay the proffered wage or salary for the four registered nurses being sponsored for permanent residency. The letter does not identify the four registered nurses by name.

On April 14, 2003, the service center received a second submission with reference to the director's original request for further evidence. In this second submission, counsel stated that the beneficiary had passed the CGFNS qualifying examination and submitted a letter to the beneficiary from the CGFNS dated August 21, 2002. Counsel also resubmitted its posting notice and the letter from [REDACTED]

In an undated decision, the director denied the petition for the petitioner's failure to provide sufficient evidence on two issues. First, the director stated that the petitioner failed to establish that it could pay the proffered wage as of the priority date. Second, the director referenced regulations outlined at 20 C.F.R § 656.22, and stated that the petitioner failed to establish that it had complied with 20 C.F. R. § 656.22(b)(2). This regulation states that the

petitioner needs to provide evidence 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 provided no further explanation of how the petitioner had not established its ability to pay the proffered wage or not complied with the regulatory criteria for job postings.

On appeal, counsel states that there is only one specific reason given for the denial, namely, whether the petitioner is able to pay the proffered wage. Counsel states that the petitioner responded to this issue and provided a statement from its vice president of administration that the hospital employs 1,749 people and that it is able to afford to pay the proffered wages of the beneficiary.

At the outset, it is not clear whether the director reviewed the evidence submitted by the petitioner either on January 3, 2003 or April 9, 2003.¹ In his request for further evidence, the director stated that the petitioner could establish its ability to pay the proffered wage by submitting a letter from a financial officer that established the petitioner's ability to pay the proffered wage. CIS and the AAO views such documentation by itself may be acceptable as proof of ability to pay, with regard to companies that have more than 100 employees. Counsel submitted such a letter twice during the initial adjudication of the instant petition. Nevertheless, the director made no comment on this documentation in his decision, nor did he request further documentation to augment the statement. A review of the I-140 petition reveals that the petitioner incorporated in 1915 and had a net annual income of \$127,765,000. The record does not contain any derogatory information such as to persuade CIS to doubt the credibility of the information contained in the vice president's statement. Furthermore, CIS computer records do not indicate numerous I-140 petitions submitted by the petitioner in 2002, and the vice president only indicates that four nurses are being considered for permanent residency as of early 2003. Therefore, the petitioner submitted sufficient documentation to establish that it had the capability of paying the proffered wage as of the priority date and onward. For this reason, the director's decision will be withdrawn and the matter remanded back to the director for further consideration of additional issues outlined below that would warrant the denial of the instant petition.

Beyond the decision of the director, it is inexplicable why the director did not examine the beneficiary's qualifications in his decision, in particular, whether the beneficiary was qualified to perform the duties of the position at the time of filing the instant petition. While the director raised the issue of the beneficiary's qualification in his request for further evidence, in his denial, the director did not mention this issue, and, thus, this issue remains unresolved. The AAO will address this issue in this proceeding.

In its response to the director's request for further evidence, counsel stated that the beneficiary was not required to have passed the CGFNS examination prior to the filing of the instant petition. It should be noted that counsel's comments on this issue misconstrue statutory and regulatory interpretation from its intended context. There has been no abrupt change in CIS policy with regard to qualifications for Schedule A registered nurses. While the law provides an inadmissibility ground applicable in a consular processing or adjustment of status scenario, it also clearly sanctions CIS to ascertain the beneficiary's qualifications in the Schedule A context during the I-140

¹ The regulation at 8 C.F.R. § 103.2(b)(8) states that additional time may not be given beyond twelve weeks for submission of evidence in response to the director's request for further evidence. The petitioner's second submission of evidence is untimely.

stage. Counsel quoted letters during the context of temporary regulatory change and a cable from a different administrative agency – neither of which constitutes established policy.

In the instant petition, the record reflects that the beneficiary had no license or CGFNS examination results as of the priority date. In its first submission of further evidence, counsel stated that the beneficiary had not yet passed the CGFNS examination. In its second submission in response to the director's November request for further evidence, counsel submitted a letter from the CGFNS that stated the beneficiary had passed the exam. This approval is dated August 21, 2002. The initial I-140 petition was received by CIS on May 20, 2002. Thus, the beneficiary did not have the appropriate CFGNS certification at the time of filing the petition. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The statute relates eligibility for the immigrant visa to the status of the labor certification at the date of the I-140 petition for classification, the priority date. See 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C). Department of Labor regulations limit the petitioner's alternatives for Schedule A under the ETA 750 to the beneficiary's state license or successful CGFNS examination results. See 20 C.F.R. § 656.22 (c)(2). The petitioner applies for labor certifications for a Schedule A occupations directly to CIS, and the Department of Labor does not review them. Hence, regulations authorize CIS officers to determine the petitioner's compliance. See 20 C.F.R. §§ 656.22(a) and (e), § 656.20(c), and 8 C.F.R. §§ 204.5(a)(2), (d), and (g)(1).

There is also no evidence in the record of proceeding pertaining to the beneficiary's passage of the NCLEX-RN examination. CIS issued a guidance memorandum from Thomas E. Cook titled "Adjudication of Form I-140 Petitions for Schedule A Nurses" etc. (2002 memorandum), dated December 20, 2002. It considered the approval of I-140 petitions when the nurse could not obtain a social security number or a permanent nursing license of a state. If the petitioner met all requirements for Schedule A classification under the ETA 750, the 2002 memorandum instructed directors of service centers and AAO and other CIS officials to consider successful NCLEX-RN results favorably. Since they satisfy § 212(r)(2) of the Act, 8 U.S.C. § 1182(r)(2), *a fortiori*, they fulfill terms of 20 C.F.R. § 656.22 (c)(2) for the alternative of approval of the I-140, based on successful examination results. This guidance memorandum did not suddenly add the NCLEX examination result to the adjudication process. The guidance memorandum expanded the list of criteria available for proving eligibility at the I-140 stage.

Thus, eligibility for a Schedule A immigrant visa based on the nursing profession requires proof of successful completion of the CGFNS examination, an unrestricted license to practice nursing in the state of intended employment, or a letter indicating successful NCLEX results. While counsel in its second submission of further evidence to the director in April 2003, did present evidence that the beneficiary had passed the CGFNS exam in August 2002, as noted previously, this evidence is considered untimely and is not considered in this proceeding. Even if the evidence of the beneficiary's passage of the CGFNS exam were accepted, the evidence would not establish that the beneficiary was qualified to perform the duties of the position as of the priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Since the record of proceeding does not contain sufficient documentation that the beneficiary was qualified for the position as of the priority date, the petition must be denied.

With regard to the director's decision as to whether the petitioner fully complied with regulatory requirements governing the posting notice, under 20 C.F.R. § 656.20, the regulations require the following:

In applications filed under 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).

Counsel submitted a document entitled "Job Posting" along with an accompanying job description, in its submission in response to the director's request for further evidence, dated January 2003. The director in his decision cited to 20 C.F.R. § 656.22(b)(2), with regard to Schedule A job postings; however, he provided no analysis of how the petitioner had failed to meet this criterion. The AAO does view the job-posting document as problematic. First, the job posting and job description identify the job as assistant nurse manager, with supervisory responsibility, while the ETA 750 identified the position as a registered nurse who will be supervised by a nurse manager. The initial I-140 petition indicates that the beneficiary's job title is registered nurse. Second, the petitioner provided no information as to where the job posting was placed and for how many days. Without more persuasive evidence, the petitioner did not establish that its job posting complied with 20 C.F.R. § 656.20.

Beyond the decision of the director, 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.² The director did not mention this issue in his decision so the AAO is not confident that it was analyzed. CIS has the authority to review the petitioner's proffered wage for compliance with 20 C.F.R. § 656.20 and, thus, with DOL's prevailing wage rates. See 20 C.F.R. § 656.22(e). DOL maintains a website at www.ows.doleta.gov which provides access to an Online Wage Library (OWL), www.flcdatcenter.com. OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically.³ The prevailing wage rates are broken down into two skill levels. According to General Administration Letter (GAL) 2-98 (DOL), "DOL Issues Guidance on Determining OES Wage Levels" and Training and Employment Guidance Letter (TEGL) No. 5-02 (DOL) provide guidance on appropriate skill level categorization. The occupation and

² See *Spencer Enterprises, Inc. v. United States*, 299 F.Supp. 2d at 1043, *aff'd*, 345 F.3d at 683; see also *Dor v. INS*, 891 F.2d at 1002 n. 9.

³ The city, state, and county of the employment location must be known in order to identify the prevailing wage rate.

corresponding job description in this case indicate that it is a Level 1 position because the proffered position of nurse will be under supervision and does not require additional training or specializations other than nursing duties delineated by the DOL's *Occupational Outlook Handbook* at page 269. OWL reports that in May 29, 2002, the prevailing wage for a registered nurse, level 1, in Suffolk County, New York, was revised to \$55,910, which is higher than the proffered salary of \$55,582. However, since the petition was filed prior to May 29, 2002, the prevailing wage for 2001 will be used for the proceedings. According to OWL, the prevailing wage for the same position in 2001 was \$50,850, or lower than the proffered wage. Thus, the proffered wage from the petitioner meets the prevailing wage rate.

Upon review of the record, the petitioner has established that it is capable of paying the beneficiary the proffered wage, and that it would be paying the prevailing wage. Nevertheless, the job posting submitted by the petitioner is deficient. Even though the director, in his decision, did not address the qualifications of the beneficiary, the deficient job posting is sufficient grounds to deny the instant petition. Accordingly the appeal will be dismissed, and the petition will be denied.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.