

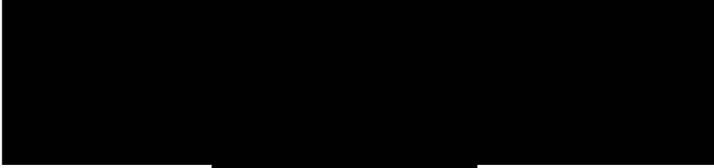


U.S. Citizenship
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FILE: [Redacted]
WAC-03-204-53690

Office: CALIFORNIA SERVICE CENTER Date: **MAR 22 2006**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 The decision of the director will be withdrawn. The petition will be remanded to the director.

The petitioner is a medical center. It seeks to employ the beneficiary permanently in the United States as a Clinical Nurse I, 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).

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.

Eligibility in this matter hinges on the qualifications of the beneficiary for the position at the priority date. Employment-based petitions depend on priority dates. The priority date for Schedule A occupations is established when the I-140 is properly filed with Citizenship and Immigration Services (CIS), (formerly the Service or the INS). 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 July 1, 2003.

The petitioner initially submitted insufficient evidence of the beneficiary's qualifications for the position. The only evidence relevant to the beneficiary's licensing as a registered nurse in California was a copy of temporary registered nurse license of the beneficiary issued on April 1, 2003 by the California Board of Registered Nursing.

In a request for evidence dated July 16, 2004 (RFE), the director requested a copy of a full and unrestricted license of the beneficiary to practice professional nursing in the State of intended employment, a copy of a certificate showing that the beneficiary had passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) examination, or a copy of a certificate showing that the beneficiary had passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) examination. *See* 20 C.F.R. § 656.10, Schedule A, Group I (April 1, 2004 ed.); Memo. from William R. Yates, Associate Director for Operations, CIS, to Regional Directors *et al.*, *Current Processing of Pending Forms I-140 for a Schedule A/Group I or II Occupations Missing Evidence of compliance with U.S. Department of Labor (DOL) Notification/Posting Requirements and Guidance Effective March 28, 2005 pursuant to new DOL regulations at 20 CFR Part 656 Regarding the New Process for Blanket Labor Certification for Schedule A.* at 2 (Sept. 23, 2005) (available at http://uscis.gov/graphics/lawsres/handbook/I140_092305.pdf).

In response to the RFE, the petitioner provided a copy of the beneficiary's California registered nurse license, showing an expiration date of April 30, 2005, but showing no date of issuance. The petitioner's submissions in response to the RFE were received by the director on August 31, 2004.

In a decision dated September 22, 2004, the director determined that the petitioner's evidence showed that the beneficiary presently holds a full an unrestricted license from the State of California. The director stated, however, that a check of public records showed that the beneficiary's license was issued on January 30, 2004, a date after the July 1, 2003 date on which the I-140 petition was filed. The director therefore found that the

petitioner had failed to establish that the beneficiary was qualified for Schedule A certification as of the priority date, and denied the petition.

In the proceedings before the director the petitioner was not represented by counsel.

On appeal, counsel submits a Form G-28, Notice of Entry of Appearance as Attorney or Representative on behalf of the petitioner. Counsel also submits a brief and additional evidence. On appeal counsel states that in the proceedings before the director, the petitioner failed to submit proper credentialing documentation showing that the beneficiary was eligible for an immigrant visa under Schedule A, Group I. Counsel states that, specifically, the petitioner failed to submit the beneficiary's NCLEX results, but instead submitted the beneficiary's California registered nurse license. Counsel states that the NCLEX results show that the beneficiary passed the NCLEX on January 31, 2003, several months prior to the submission of the I-140 petition on July 1, 2003.

In support of the appeal, counsel submits additional evidence. The evidence submitted on appeal includes a letter dated February 9, 2006 from the Director of Academic Services and Human Resources of the petitioner. In that letter, the writer states that the petitioner did not retain counsel for the proceedings before the director, and that the petitioner inadvertently failed to submit a copy of the beneficiary's NCLEX results in response to the RFE.

The evidence submitted on appeal also includes a copy of an NCLEX-RN Candidate Report of the beneficiary showing the beneficiary's passing results on the NCLEX Registered Nurse examination given on January 31, 2003.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). In the RFE, the director mentioned the beneficiary's NCLEX results as one of the three types of evidence which might be submitted to establish the beneficiary's qualification as a nurse for purposes of Schedule A. In response, the petitioner submitted a copy of the beneficiary's registered nurse license from California, which was another of the types of acceptable evidence mentioned in the RFE. Since the petitioner's submission in response to the RFE complied with the request in the RFE, the AAO finds no reason to preclude consideration of the evidence submitted for the first time on appeal, even though the evidence submitted on appeal would also have been responsive to the RFE. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In the instant appeal, counsel states that the beneficiary "passed the NCLEX on January 31, 2003" (Brief, February 14, 2006, at 1).

The record also contains a copy of certificate dated February 28, 2003 issued to the beneficiary by the Education Department of the University of the State of New York stating that the beneficiary has completed the education requirements and other requirements prescribed by law and is qualified to practice as a registered professional nurse in the State of New York.

The copy of the beneficiary's NCLEX-RN Candidate Report submitted in evidence on appeal, showing her passing results in the examination given on January 31, 2003, is therefore sufficient to establish that the beneficiary had passed the NCLEX for registered nurses as of the July 1, 2003 priority date. The certificate dated February 28, 2003 from the University of the State of New York is sufficient to establish that the beneficiary had been notified of her passing results as of February 28, 2003. The evidence is therefore sufficient to establish that the beneficiary qualified for classification under Schedule A as a registered nurse as

of the July 1, 2003 priority date. It should be noted that although the above documents show that a nursing license was issued to the beneficiary by the State of New York, that is not her state of intended employment under the instant petition, which is based on an alien labor certification for her employment in the State of California.

In his decision, the director correctly found that the copy of the beneficiary's California registered nurse license submitted in response to the RFE failed to establish that the beneficiary was qualified under Schedule A as a registered nurse as of the priority date. The decision of the director to deny the petition was correct, based on the evidence in the record before the director. However, for the reasons discussed above, the assertions of counsel on appeal and the evidence submitted for the first time on appeal are sufficient to overcome the decision of the director on that issue.

Notwithstanding the above finding, the evidence in the record raises another potential ground for denying the petition which was not considered by the director, namely whether the petitioner complied with all regulatory requirements for a blanket labor certification for a Schedule A occupation.

The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New regulations issued by the Department of Labor concerning labor certifications went into effect in March 2005, but the instant petition is governed by the prior regulations. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The citations below are to the Department of Labor regulations as in effect prior to the 2005 amendments.

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. . . .
 - (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 regulation at 20 C.F.R. § 656.20(g)(1) states, in pertinent part:

In applications filed under . . . [§] 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.*

(Emphasis added).

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.

The regulation at 20 C.F.R. § 656.20(g)(8) provides, in pertinent part:

If an application is filed under the Schedule A procedures at § 656.22 of this part, the notice shall contain a description of the job and rate of pay

The petitioner submitted a copy of a notice of job opportunity with its petition. The petitioner's Director for Academic Services/Human Resources attested that the notice was posted for ten consecutive days. However, that official also states that the dates of posting were from April 23, 2003 to April 30, 2003, which is a period of seven days. The attestation states that the notice was posted in a conspicuous place "in the Los Angeles office" The ETA 750 states that the petitioner's address is on Alden Drive in Los Angeles. Presumably that location is the "Los Angeles office" referred to in the attestation. However, the ETA 750 states that the address where the beneficiary will work is an address on Beverly Boulevard in Los Angeles. That address would appear to be the "facility or location of employment" where the notice of job opportunity must be posted under 20 C.F.R. § 656.20(g)(1)(ii).

The evidence therefore appears to be insufficient to establish that the notice was posted for ten consecutive days at the facility or location of the employment as required by 20 C.F.R. § 656.20(g)(1)(ii).

Since the director did not consider the issue of the length of time during which the notice of job opportunity was posted nor the location of the posting, the petition must be remanded to the director for consideration of those issues. In the event that the director finds that the evidence is insufficient to support an approval of the petition, the director may deny the petition without prejudice to the petitioner filing a new I-140 petition on behalf of the same beneficiary, supported by all required documentation.

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 met that burden.

ORDER: The decision of the director is withdrawn. The petition is remanded to the director.