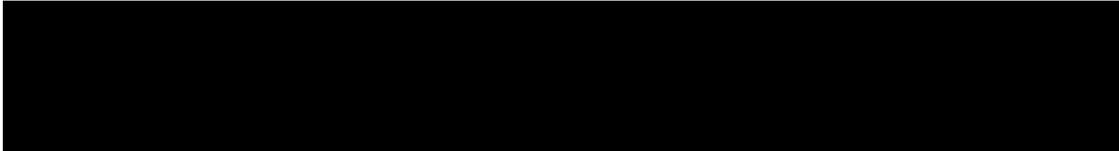


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FILE:

WAC 05 074 52736

Office: CALIFORNIA SERVICE CENTER

Date: APR 10 2007

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a healthcare provider. 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, commonly referred to as Schedule A, Group 1. The director determined that the petitioner had not established that the beneficiary had passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) examination, or held a full and unrestricted license to practice professional nursing in the state of Nevada as of the priority date of the visa petition.

The record shows that the appeal is properly filed and timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's August 26, 2005 denial, the single issue in this case is whether or not the beneficiary had the requisite licensure as of the priority date of the visa petition.

Section 203(b)(3)(A)(i) of 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, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 January 13, 2005. Aliens who will be permanently employed as registered 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 Citizenship and Immigration Services (CIS) office. Pursuant to 20 C.F.R. § 656.22 (b) (1) and (2), a Schedule A 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 20 C.F.R. § 656.20(g)(3).

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.¹ 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).

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². On appeal, counsel submits a document from the University of the State of New York Education Department that states the beneficiary is qualified to practice as a registered professional nurse in the state of New York as of August 1, 1995. Counsel also submits a sheet of instructions from the Nevada State Board of Nursing that outlines instructions for application for registered nurses and licensed practical nurse licenses by endorsement.

The record also contains a temporary registered nurses license issued by the state of California Board of Registered Nursing on October 19, 2004 and valid until April 19, 2005. With the initial petition, the petitioner also submitted an English language document that purports to be the beneficiary's certificate of graduation from a three year nursing program at the [REDACTED] School of Nursing, Chonbuk, Korea signed by the President, [REDACTED] School of Nursing. The record contains a second English language document signed by [REDACTED] Minister of Health & Welfare, Republic of Korea, that stated the beneficiary had graduated from the Kaejong Junior College of Nursing on February 5, 1987, passed her national examination, and was licensed as a nurse in the Republic of Korea. This document was dated September 22, 2004. The record also contains a one-page transcript of the beneficiary's nursing studies, along with documentation of the beneficiary's studies and certificate of graduation with a bachelor's degree in home economics in 1996 from Korea National Open University, Seoul, Korea.

In response to the director's request for further evidence with regard to the beneficiary's nursing license, the petitioner submitted a copy of the beneficiary's full and unrestricted registered nurse license from the Nevada State Board of Nursing. This license is dated April 28, 2005 and is valid until January 3, 2007. It is noted that in his request for further evidence, the director stated that the petitioner could either submit documentation that the beneficiary passed the CGFNS examination, or holds a full and unrestricted license to practice

¹ Thus, the date of receipt of the petition by Citizenship and Immigration Services (CIS) is considered the priority date for the Form ETA 750. 8 C.F.R. § 204.5(d).

² 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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

nursing in the state of intended employment, or the petitioner could submit evidence of the beneficiary passing the National Council Licensure Examination of Registered Nurses (NCLEX-RN) examination. The director noted that the third option required a certified copy of a letter from the state of intended employment that confirmed the beneficiary had passed the NCLEX-RN examination and was eligible to be issued a license to practice nursing in that state.

On appeal, counsel states that the beneficiary passed the NCLEX-RN exam in 1995, well in advance of the filing of the instant petition, and had obtained a full and unrestricted license to practice professional nursing from the state of New York. Counsel asserts that the beneficiary would not have been able to obtain the registered license from the state of New York had she not passed the NCLEX-RN exam. Counsel states that since the beneficiary was in possession of a full and unrestricted license from the state of New York, she qualified for endorsement into other states as a registered nurse. Counsel states that both the Nevada and California State Boards of Nursing require a social security number in order to issue the full and unrestricted license to practice professional nursing, and that the California State Board of Nursing will issue a temporary license when the applicant qualifies for the full and unrestricted license, except for not having a social security number. Counsel references a memorandum dated December 20, 2002, and signed by [REDACTED] Acting Assistant Commissioner, Office of Adjudications, "Adjudication of I-140 Petitions for Schedule-A Nurses Temporarily Unable to Obtain Social Security Cards," with regard to the requisite examinations and the impact of not being able to secure an unrestricted license without a social security number. Counsel states that it is not the policy of the Nevada state nursing board to issue a letter to applicants to confirm their eligibility but for having a social security number. Because of this, counsel stated she submitted the beneficiary's temporary registered license from the state of California as evidence that the beneficiary had passed the NCLEX-RN exam prior to the petition having been filed on the beneficiary's behalf.

Upon review of the record, the beneficiary, at the time the instant petition was filed on January 13, 2005, did not possess a full and unrestricted nursing license from the state of Nevada, the state of intended employment. Although counsel submitted such a license in response to the director's request for further evidence, this license is valid as of April 28, 2005.³ 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).

With regard to counsel's comments on appeal with regard to the University of the State of New York license and the state of California's temporary license being sufficient evidence of the beneficiary's having passed the NCLEX-RN examination, counsel's assertions are not sufficient. First, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Second, the more probative documentation would be the actual documentation as to when the beneficiary took the exam, the NCLEX-RN test results, and/or an explanation of why such documentation was not submitted with the initial petition. Furthermore, the record contains no evidence that any license documentation provided by the State of New York in 1995 would still be viable for endorsement by any

³ The AAO also notes that the copy of the Nevada State Board Nursing license, submitted in response to the director's request for further evidence is poorly copied and does not identify whether the state of Nevada qualified the beneficiary as a registered nurse or as a licensed practical nurse, both of which classifications are licensed by the Nevada board.

other state licensing board ten years after its issuance. The record contains no evidence that the beneficiary ever worked in the United States as a registered nurse prior to the submission of the instant petition, and maintained valid unrestricted licensure that could be endorsed by another state nursing board. The Form ETA 750, Part B indicates that she most recently worked as a registered nurse in Korea from March 1994 to April 2001.

On appeal, counsel references a guidance memorandum from [REDACTED] titled "Adjudication of Form I-140 Petitions for Schedule A Nurses," dated December 20, 2002. For further clarification, the AAO will briefly comment on this memorandum. The guidance 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 accept a certified copy of a letter from the state of intended employment stating that the beneficiary has passed the NCLEX-RN and is eligible to receive a license to practice nursing in the state in lieu of either having passed the CGFNS exam or currently having a license to practice nursing in that state. 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. The guidance memorandum expanded the list of criteria available for proving eligibility at the I-140 stage.

In the instant petition, the record reflected no permanent license from the state of intended employment or CGFNS examination results at the priority date. Additionally, as stated previously, the record of proceeding does not contain evidence pertaining to the beneficiary's passage of the NCLEX-RN examination. 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).

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. The record of proceeding does not contain any of the required evidence in the instant matter for the beneficiary as of the January 2005 priority date, and thus the petition must 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. The appeal will be dismissed. The petition is denied.

ORDER: The appeal is dismissed.