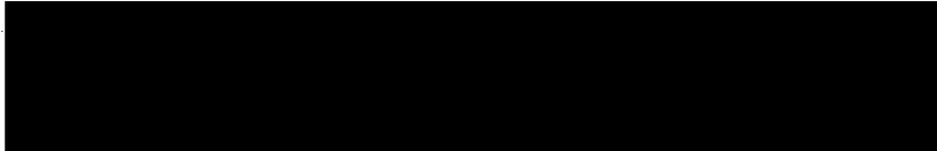


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U.S. Citizenship
and Immigration
Services

B6



FILE:



Office: CALIFORNIA SERVICE CENTER

Date: APR 19 2007

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IN RE:

Petitioner:

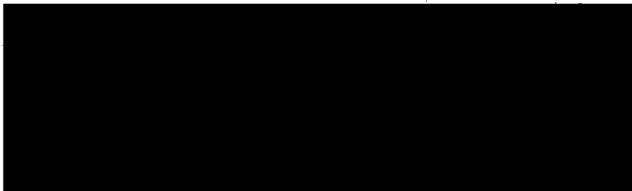


Beneficiary:

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:



PUBLIC COPY

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, Chief
Administrative Appeals Office

DISCUSSION: The director, California Service Center, denied the immigrant visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

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 beneficiary was not qualified for the proffered position as there was no evidence of a Commission of Graduates of Foreign Nursing Schools (CFGNS) certificate, an unrestricted state license to practice nursing, or a letter from the state of intended employment (California) confirming that the beneficiary had passed the NCLEX-RN¹ examination, and was eligible to practice nursing in the state of California, as of the December 15, 2004 priority date.

The record shows that the appeal is properly filed, 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 9, 2005 denial, the main issue in this case is whether or not the petitioner established that the beneficiary had the requisite licensure to perform the duties of the proffered position as of the priority date.

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 nature, for which qualified workers are not available in the United States.

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. 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, in effect prior to November 28, 2005, aliens who will be permanently employed as professional nurses must have (1) passed the CGFNS examination, or (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program." The priority date of any petition filed for classification under section 203(b) of the Act "shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [Citizenship and Immigration Services (CIS)]." 8 C.F.R. § 204.5(d). Here, as previously stated, the priority date is December 15, 2004.

¹ NCLEX stands for National Council Licensure Examination for Registered Nurses.

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 certificate from the International Commission on Healthcare Professionals, a division of CGFNS, Philadelphia, Pennsylvania. This document states the beneficiary is certified as a registered nurse, as of October 14, 2005. Counsel also submits a letter dated November 29, 2005 from the Board of Registered Nursing, Sacramento, California. [REDACTED], staff services analyst, California State Board of Registered Nursing, states that the Board issued a temporary license to the beneficiary on November 4, 2004 and that it expired on May 4, 2005. Ms. [REDACTED] also states that the temporary license was issued in lieu of a permanent license as the beneficiary did not possess a valid social security number. Finally Ms. [REDACTED] states that a permanent registered nurse license was issued as soon as a social security number was provided.

Counsel also resubmits a copy of an excerpt from a state of California website that discussed the issuance of temporary nurse licenses by the Board of Registered Nursing to individuals who are eligible for temporary licenses because they have passed NCLEX-RN in another state and hold an "active, current, and clear nursing license." Counsel also resubmits a copy of the beneficiary's temporary registered nurse license issued by the state of California on November 2004.

Counsel also submits a document from the Division of Professional Licensing Services, Certification and Verification Unit, Albany, New York, that certified that the beneficiary was issued a license for the practice of registered nursing on March 20, 2004 based on her passage of the NCLEX test in March 2004. This document also indicated that the beneficiary was registered as a nurse with the New York Board of Regents until February 28, 2007. Counsel also submits a copy of the beneficiary's state of New York nursing license issued on March 20, 2004.

Finally, counsel submits a copy of an interoffice memorandum written by [REDACTED], Acting Assistant Commissioner, Office of Adjudications, dated December 20, 2002, entitled "Adjudication of Form I-140 Petitions for Schedule-A Nurses Temporarily Unable to Obtain Social Security Cards."³

The record also contains a copy of the beneficiary's permanent nursing license issued by the state of California Board of Registered Nursing issued on March 21, 2005, as well as a letter dated March 2, 2005 from the California Board of Registered Nursing to the beneficiary, that states the beneficiary met all other licensing requirements except for submitting a valid U.S. social security number. This letter indicates that the beneficiary filled out the bottom part of the letter and submitted her social security number to the state board on March 15, 2005.

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).

³ Memorandum from [REDACTED] Acting Assistant Commissioner, Office of Adjudications, *Adjudication of Form I-140 Petitions for Schedule-A Nurses Temporarily Unable to Obtain Social Security Cards*, HQ70/6.13, (December 20, 2002).

With the initial petition, the petitioner submitted evidence of the academic coursework undertaken by the beneficiary at Kyungbuk College, Kyungsangbuk-do, Korea and Chodan University, Chonnam, Korea in Nursing and the certifications of graduation from both institutions.

On appeal, counsel states that prior to filing the instant petition, the California Board of Registered Nursing issued a temporary license to the beneficiary as evidence that she had met all licensing requirements except that she lacked a social security number. Counsel then states that when the director issued his second request for further evidence on August 18, 2005, requesting evidence that the beneficiary was eligible for a permanent California RN license, the beneficiary was eligible for such licensure, except for the possession of a social security number.

Counsel also states that when the director's second request for further evidence was received, counsel contacted the California Board of Registered Nurses to request a letter confirming the beneficiary's NCLEX-RN passage and was told that it was no longer the policy of the California Board of Registered Nurses to issue such letters. Counsel states that the Board did provide counsel with a copy of a letter issued to the beneficiary in March 2005 confirming that she had met all of the licensing requirements and would be issued a permanent license upon submission of her social security number. Counsel also asserts that the Board also confirmed that although the beneficiary had passed the NCLEX-RN exam and was eligible for the permanent license at the time the I-140 petition was filed, the Board would not have issued such a letter with regard to the missing social security number, described by counsel as a "but for" letter, at that time. Counsel states that the Board referred counsel to its website with instructions for the issuance of temporary license in lieu of a letter confirming the passage of NCLEX-RN examination. Counsel states that the state agency informed her that only temporary licenses were issued to nursing license applicants who had passed the NCLEX-RN exam.

The record reflected no permanent license or CGFNS examination results at the priority date.⁴ 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 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).

However, the record of proceeding does contain evidence pertaining to the beneficiary's passage of the NCLEX-RN examination prior to the filing date of the petition. The documentation submitted by counsel from the State of New York establishes that the beneficiary passed the NCLEX-RN test and that she held an active state of New York license valid until 2007.⁵ As stated previously, on appeal, counsel also references a guidance memorandum from Thomas E. Cook, dated December 20, 2002. It considered the approval of I-140 petitions when the nurse could not obtain a permanent nursing license in the state of intended employment based on the lack of a social security number. If the petitioner met all requirements for Schedule A classification under the ETA 750, the 2002

⁴ The record does reflect that the state of California issued the beneficiary a permanent registered nurse license on March 21, 2005, after the priority date filing of December 15, 2004.

⁵ While the beneficiary passed the NCLEX-RN examination, based on the Form ETA 750 filed with the instant petition, she did not work in the state of New York as a registered nurse, or elsewhere in the United States prior to the submission of the instant petition.

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 add the NCLEX examination result to the adjudication process, but rather expanded the list of criteria available for proving eligibility at the I-140 stage. With regard to CIS concerns over the proof of permanent state licensure, the Cook memorandum states that:

provided that all other requirements applicable to the petition are met, Service Centers can favorably consider the I-140 petition for a foreign nurse, as being eligible for a schedule A labor certification, upon presentation of a certified copy of a letter from the state of intended employment which confirms that the alien has passed the NCLEX-RN examination and is eligible to be issued a license to practice nursing in that state.

The AAO acknowledges that the beneficiary received a temporary nursing license from the state of California prior to the December 15, 2004 priority and filing date. The AAO also acknowledges that at the time of the filing of the petition, the beneficiary had passed the NCLEX-RN examination, although the record does not contain evidence of a certified letter from the state of California as to the beneficiary's ability to be issued a license to practice nursing.

With regard to the guidance contained in the Cook memorandum, the AAO also acknowledges that passage of the NCLEX-RN examination as evidence of permanent registered nursing licensure has been codified by the Department of Labor in its recently revised regulations for Schedule A applications.⁶ Upon review of the record, the AAO finds counsel's explanation of why a certified letter was not provided to the record to be reasonable. The additional correspondence from the state of California Board of Registered Nursing and its website also provides sufficient additional evidence to support counsel's assertion that the beneficiary received her temporary nursing license from the state of California by virtue of having passed the NCLEX-RN exam. Therefore, the record of proceeding reflects that the beneficiary passed the NCLEX-RN exam and was eligible to be issued a license to practice nursing in California, the state of intended employment. Thus, the petitioner has established that as of the filing date, the beneficiary was qualified to perform the duties of the proffered position.

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 sustained that burden. The appeal is sustained. The petition is approved.

ORDER: The appeal is sustained.

⁶ New DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. See 69 Fed. Reg. 77325; 77326 (Dec. 27, 2004).