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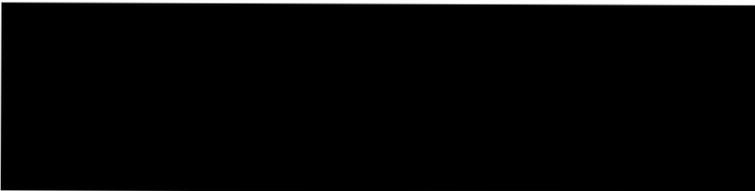
Petitioner:

Beneficiary:



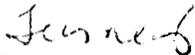
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

  
for Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the director for further investigation and entry of a new decision.

The petitioner is a skilled nursing facility. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for a blanket labor 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). The director determined that the petitioner had not established that the beneficiary possessed the necessary educational credentials required by the terms of the labor certification and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional information and asserts that the petitioner did not receive a request to provide evidence of the beneficiary's academic qualifications as indicated by the director in his denial.

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. Relevant post-secondary education may be considered as training for the purposes of this provision.

In this case, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as a professional (registered) nurse. Aliens who will be employed as professional nurses are listed on Schedule A. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.10 with respect to 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.

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 which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of Labor's Labor Market Information Pilot Program 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).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) also provides that if a 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 regulations set forth in Title 20 of the Code of Federal Regulations also provide specific guidance relevant to the requirements that an employer must follow in seeking certification under Group I of Schedule A. An employer must file an application for a Schedule A labor certification with CIS. It must include evidence of

prearranged employment for the alien beneficiary signified by the employer's completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.20(g)(3). 20 C.F.R. § 656.22(a) and (b).

The regulation at 20 C.F.R. 656.22(c)(2) also 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 the 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.<sup>1</sup> Application for certification of employment as a professional nurse may be made only pursuant to this §656.22(c), and not pursuant to §§ 656.21, 656.21a, or 656.23 of this part.

In this case, the immigrant visa petition was filed on May 25, 2004. Part 14 of the ETA 750A accompanying the petition requires that the applicant for the certified position of registered nurse possess four years of college culminating in a Bachelor of Science in Nursing. Item 15 requires that the applicant must have a valid California Registered Nurse License or CGFNS Certificate.

The record indicates that the beneficiary obtained her California license as a registered nurse on August 11, 2003. The petitioner submitted evidence of this prior to the issuance of the denial. The director's denial dated August 19, 2005 is based only the petitioner's alleged failure to provide a copy of the beneficiary's official record showing that she possesses a Bachelor of Science in Nursing. Thus, the sole issue on appeal arises from the petitioner's claim that CIS failed to properly provide it with a copy of the second request for evidence dated April 23, 2005 in which the director requested evidence of the beneficiary's education and training as specified on the Form ETA 750.

The record includes two requests for evidence. The first request is dated January 21, 2005. This request included instructions to the petitioner to provide various documentation of the beneficiary's licensure as a registered nurse, copies of tax documents related to the beneficiary's income and wages, and copies of the beneficiary's qualifying medical examination and immunization record. The petitioner provided a timely, complete response to this request. The second request for evidence is dated April 23, 2005. CIS should have mailed the petitioner and counsel a cover letter for this request attached to a second sheet which includes the actual documents requested by the director. However, the petitioner's timely response to this request suggests that CIS sent the petitioner its

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<sup>1</sup> On October 2, 2002, the Department of Labor (DOL) advised the Service, now CIS, that because many states accept passage of the National Council Licensure Examination for Registered Nurses (NCLEX-RN), a state licensing examination, it planned to pursue conforming amendments to the regulations at 20 C.F.R. 656.22(C)(2) and advised the Service that it may favorably consider an I-140 petition for a foreign nurse for Schedule A labor certification if a certified copy of a letter from the state of intended employment is submitted showing that the alien has passed the NCLEX-RN examination. See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Adjudications, *Adjudication of Form I-140 Petitions for Schedule-A Nurses Temporarily Unable to Obtain Social Security Cards* (December 20, 2002).

cover letter for the request, attached to which, in lieu of the list of documents actually requested by the director, is a printout from a CIS electronic database which contains fields that relate to counsel's identifying information such as counsel's attorney registration or bar card number. This CIS printout is also dated April 23, 2005.

Accordingly, counsel claims on appeal that the director's April 23, 2005, request for evidence, instructed the petitioner only to supply counsel's bar card number, which he was timely provided. Counsel also submits on appeal two affidavits from the petitioner and counsel's office which both attest that the request for evidence dated April 23, 2005 did not include a request for documentation of the beneficiary's nursing degree, but only a request for counsel's attorney registration number.

This office notes that there are a number of anomalies in the record. First, the director's attachment relevant to the second request for evidence dated April 23, 2005, which lists the request for documentation of the beneficiary's nursing degree, appears only on the non-record side of the file. That is, the attachment for the second request for evidence is not in its proper location on the record side of the A-file. Second, counsel provided proof that CIS sent him a printout from a CIS electronic database which was printed on the same date as the second request for evidence. Counsel indicated that CIS provided this printout to him in error, in lieu of the director's list of requested documents. The service center provided no alternative explanation as to why counsel had this printout. This office also notes that on appeal counsel did provide reliable evidence which documents that the beneficiary obtained her nursing degree more than three years before the priority date in this case. As such, the preponderance of the evidence supports a finding that the petitioner was not made aware of the director's request for documentation of the beneficiary's nursing degree until it received the director's denial. This office accepts the evidence submitted on appeal and finds that the beneficiary has the necessary bachelor's degree in nursing to qualify for the certified position.

However, the petitioner failed to establish that the certified job opportunity had been properly posted as of the date of filing the petition. Specifically, if an application is filed under Schedule A procedures, the notice must state that any person may provide documentary evidence relevant to the application to the local DOL employment service office and/or to the regional DOL certifying officer. 20 C.F.R. § 656.20(g)(8); 20 C.F.R. § 656.20(g)(3)(ii) and (iii). The proof of posting submitted into the record indicates that the posting erroneously stated that any person may provide documentary evidence relevant to the application to the *CIS regional service center*. The decision of denial did not discuss this issue, and, as such, the petitioner has not been accorded an opportunity to respond to it.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of 20 C.F.R. § 656.20(g)(8); 20 C.F.R. § 656.20(g)(3)(ii) and (iii). The director also may instruct the petitioner to address any other issues relevant to the approval of this petition which have not yet been adjudicated, such as requesting that the petitioner provide further documentation that it has the ability to pay the proffered wage from the priority date onwards. In turn, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.