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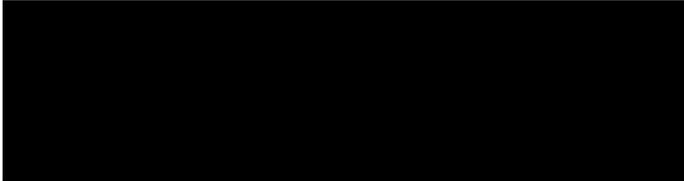
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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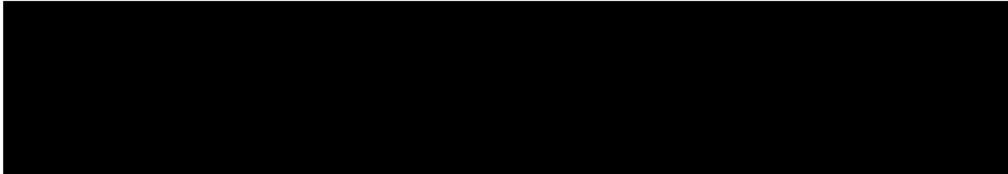
FILE: WAC 05 121 50267 Office: CALIFORNIA SERVICE CENTER Date: JAN 02 2008

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the immigrant visa petition and affirmed that decision after reviewing a subsequent motion to reopen/reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner¹ is a hospital. 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, Schedule A, Group I. The director determined that the evidence submitted does not demonstrate that the beneficiary held a full and unrestricted license to practice nursing in the State of intended employment which is California. Further, the petitioner did not provide a certified letter from the State of California stating that the beneficiary was eligible for licensure in that state at the time of filing the petition. Also, the director stated that the petitioner failed to provide evidence that the beneficiary had passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination. Therefore the director found that the beneficiary was not qualified for labor certification under the Schedule A requirements, and, he denied the petition accordingly.

According to the petitioner, it has been in operations since 1907. The hospital employs 750 personnel and its gross annual revenues are over \$62 Million.

Here, the petition and Form ETA 750 were accepted on March 24, 2005. The proffered wage as stated on the Form ETA 750 is \$26.10 and 1/2 cent per hour (\$54,298.40 per year). The Form ETA 750 states that the position requires a college degree in nursing.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

Relevant evidence in the record includes the following documents: explanatory letters from counsel dated March 21, 2005 and August 22, 2005; a "Notice of Filing of Application for Alien Employment ..." for the job position of registered nurse at the rate of pay of \$26.10 and 1/2 cent per hour; the beneficiary's NCLEX-RN candidate report dated November 11, 2004, stating that the beneficiary has passed the National Council Licensure Examination for registered nurses; approximately 43 pages of Rideout Memorial Hospital information concerning the organization and its services; combined financial statements for the years ended June 30, 2004 and 2003 for the Fremont-Rideout Health Group and its affiliates; an excerpt from the U.S. Department of Labor on Schedule A regulatory criteria; and, a CIS Interoffice Memorandum (HQOPRD 70/6.1.3) dated December 20, 2002.

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

¹ According to Citizenship and Immigration Services (CIS) information found in its electronic database, the petitioner has 81 I-140 petition cases outstanding.

² The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

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.

In this case, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(ii) of the Act as a professional worker (registered nurse). Aliens who will be employed as nurses are listed on Schedule A. Schedule A is a list of occupations found at 20 C.F.R. § 656.10. The Director of the United States Employment Service has determined that an insufficient number of United States workers are able, willing, qualified, and available to fill the positions available in those occupations, 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 20 C.F.R. § 656.10(a)(2) specifies that professional nurses are among those qualified for Schedule A designation if they have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or hold a full and unrestricted license to practice professional nursing in the state of intended employment.

The regulation at 20 C.F.R. § 656.22(c)(2) 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 its 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.

In a memo dated December 20, 2002, the Office of Adjudications of the CIS issued a memo instructing Service Centers to accept a certified copy of a letter from the state of intended employment stating that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) and is eligible to receive a license to practice nursing in that state in lieu of either having passed the CGFNS examination or currently having a license to practice nursing in that state.

In this case, Form I-140 was filed on March 24, 2005. On September 17, 2005, the Director, California Service Center, issued a decision in this matter. The director determined that the evidence submitted does not demonstrate that the beneficiary held a full and unrestricted license to practice nursing in the state of intended employment which is California. Further, the petitioner did not provide a certified letter from the state of California stating that the beneficiary was eligible for licensure in that state at the time of filing the petition. Also, the director stated that the petitioner failed to provide evidence that the beneficiary had passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination. The director found that the petition was not, therefore, approvable on the date of filing and denied the petition.

The regulation at 20 C.F.R. 656.22(e) states in part:

An Immigration Officer shall determine whether the employer and alien have met the applicable requirements of Sec. 656.20 of this part, of this section, and of Schedule A ...

(2) The Schedule A determination of INS (CIS) shall be conclusive and final. The employer, therefore, may not make use of the review procedures at Sec. 656.26 of this part.

According to counsel's explanatory letter in this matter dated August 22, 2005, counsel stated that the U.S. Department of Labor, Employment and Training Administration has modified its requirements on Schedule A regulatory criteria for registered nurses. Counsel referenced 20 C.F.R. § 656.5(a)(2)(iii) that he asserted only requires nurses to pass the National Council Licensure Examination for Registered Nurses. According to counsel, the requirement is also mentioned in a CIS Interoffice Memorandum (HQOPRD 70/6.1.3) dated December 20, 2002.

As stated above, in a memo dated December 20, 2002, the Office of Adjudications of the INS, now CIS, issued a memo instructing Service Centers to accept a certified copy of a letter from the state of intended employment stating that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) and is eligible to receive a license to practice nursing in that state in lieu of either having passed the CGFNS examination or currently having a license to practice nursing in that state.

On appeal, counsel repeats the contentions mentioned above in his letter dated August 22, 2005. Counsel referenced 20 C.F.R. § 656.5(a)(2)(iii) that he asserted only requires nurses to pass the National Council Licensure Examination for Registered Nurses to qualify for Schedule A treatment.

Counsel is citing a regulation that is effective for petitions filed on or after March 28, 2005. Since the Form I-140 was filed on March 24, 2005, the regulation at 20 C.F.R. § 656.22(c)(2) applies to this case.

According to counsel, the requirement is also mentioned in a CIS Interoffice Memorandum (HQOPRD 70/6.1.3) dated December 20, 2002.

On appeal, counsel submits the following documents: an explanatory letter dated November 21, 2005; a CIS Interoffice Memorandum (HQOPRD 70/8.5) dated September 23, 2005; a CIS Interoffice Memorandum (HQOPRD 70/6.1.3) dated December 20, 2002.

Counsel's statements are incorrect in this matter since the evidence submitted does not demonstrate that the beneficiary held a full and unrestricted license to practice nursing in the State of intended employment which is California. Further, the petitioner did not provide a certified letter from the State of California stating that the beneficiary was eligible for licensure in that State at the time of filing the petition.³ Lacking such evidence, the record fails to establish that the beneficiary is qualified for Schedule A designation. See 20 C.F.R. § 565.10(a)(2). Thus, the evidence does not establish that the beneficiary qualifies for an occupation listed in Schedule A, Group I.

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 not met that burden.

ORDER: The appeal is dismissed.

³ Also, the director stated that the petitioner failed to provide evidence that the beneficiary had passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination.