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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: OCT 01 2008
SRC-06-241-53063

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas 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 an acute care facility. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for Schedule A, Group I labor certification pursuant to 20 C.F.R. § 656.5(a). As set forth in the director's December 12, 2007 denial, the director determined that the petitioner did not provide evidence to establish that the beneficiary met the eligibility requirements at the time of filing. Therefore, the director denied the petition.

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.

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.

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 August 7, 2006 with accompanying ETA Form 9089, Application for Permanent Employment Certification. 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 Department of Labor (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). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. Thus, PERM applies to the instant case.

The PERM regulations provide that an employer must apply for a labor certification for a Schedule A occupation by filing an ETA Form 9089, Application for Permanent Employment Certification with the appropriate Citizenship and Immigration Services (CIS) office under 20 C.F.R. § 656.15(c). The regulation at 20 C.F.R. § 656.15(c)(2) provides in pertinent part that:

(2) An employer seeking a Schedule A labor certification for an alien to be employed as a professional nurse (Sec. 656.5(a)(2)) must file as part of its labor certification application documentation that the alien has received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); that the alien holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment; or that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). Application for certification of employment as a professional nurse may be made only under this Sec. 656.15(c) and not under Sec. 656.17.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the priority date in the instant case is August 7, 2006.

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 relevant evidence in the record, including new evidence properly submitted on appeal.¹ However, counsel does not submit any new or additional evidence on appeal.

With the initial filing, the petitioner submitted the beneficiary's bachelor of science in nursing degree, transcripts from the University of Santo Tomas in the Philippines, and a copy of exam appointment for NCLEX-RN. The director issued a request for evidence (RFE) on September 8, 2006 requesting evidence that the beneficiary either received a Certificate from CGFNS, holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment or has passed the NCLEX-RN. In a response which was received by the director on November 13, 2006, counsel submitted the beneficiary's unrestricted RN license in the State of New York issued on September 21, 2006 and Visa Screen Certificate from the International Commission on Healthcare Professions (ICHP), a division of CGFNS, issued on October 13, 2006. The director determined that the beneficiary did not meet the eligibility requirements at the time of filing since the petitioner failed to submit evidence that the beneficiary was awarded a New York license, CGFNS certificate or passed NCLEX-RN prior to the priority date in the instant case, August 7, 2006.

On appeal, counsel asserts that the beneficiary was fully qualified on the filing date of August 7, 2006 as she passed the NCLEX-RN on October 13, 2006, prior to the priority date, and that the previously submitted copy of the exam appointment for NCLEX-RN is sufficient to determine that the beneficiary passed the NCLEX-RN.

The record contains a copy of the exam appointment details for NCLEX-RN, which shows that on November 11, 2005 an examination appointment for NCLEX-RN was made for 8:00 am, May 31, 2006 at Pearson Professional Centers in Wethersfield, CT. The exam appointment also shows "pass" as status, based on which counsel asserts that the petitioner submitted sufficient evidence to demonstrate that the beneficiary passed the NCLEX-RN prior to the priority date. The NCLEX-RN is administrated by the National Council of State Boards of Nursing (NCSBN). However, the petitioner did not submit any official documentary evidence from the NCSBN notifying the beneficiary of, certifying or confirming that the beneficiary passed the exam. In addition, the submitted exam appointment details are not supported by any evidence to establish that the beneficiary sat for the examination at the time as scheduled with the exam appointment. Nor does the record contain any evidence confirming that the word "pass" next to the status on the exam appointment means that the beneficiary passed the examination.

¹ 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).

Results of an examination are not issued when examinations are scheduled. The AAO cannot conclude that the beneficiary passed the NCLEX-RN on May 31, 2006 solely based on the word “pass” next to Status on the exam appointment and without further supporting evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Counsel’s assertions are not persuasive and the petitioner did not submit sufficient evidence to establish that the beneficiary passed the NCLEX-RN prior to the priority date in the instant case.

On appeal, the petitioner submitted a copy of the beneficiary’s license to practice nursing in the State of New York which clearly shows that her license was not issued until September 21, 2006. The record does not contain evidence that the beneficiary passed either the CGFNS, the NCLEX-RN examination, or held a full and unrestricted (permanent) license to practice nursing in the State of New York before August 7, 2006. A petitioner must establish the beneficiary’s eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the petition cannot be approved based on evidence in the record.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.