

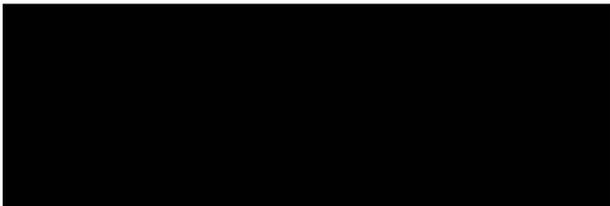
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FILE: LIN 04 097 70001 Office: NEBRASKA SERVICE CENTER Date: SEP 12 2006

IN RE: Applicant:



APPLICATION: Application for Authorization to Issue Certification for Health Care Workers pursuant to section 212(a)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(C)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 application was denied by the Acting Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant seeks to obtain authorization to issue visa-screening certificates to foreign health care workers. The acting director determined, in conjunction with the recommendation of the Secretary of Health and Human Services (HHS), that the applicant had failed to provide a response to the regulatory standards delineated at 8 C.F.R. §§ 212.15(k)(3)(ii), (iii) and (vii), and (8)(iv); and had failed to provide sufficient information and evidence illustrating that it met the regulatory standards delineated at 8 C.F.R. §§ 212.15(k)(1)(ii)(A), (2)(i), (3)(v), and (4)(iv) and (vii).

On appeal, the applicant submits a brief.

Section 212(a)(5)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(5)(C), provides for the granting of authorization to an independent credentialing organization, deemed equivalent to the Commission on Graduates of Foreign Nursing Schools (CGFNS) by Citizenship and Immigration Services (CIS) in consultation with HHS, to issue a certificate to foreign health-care workers to overcome the inadmissibility provision at section 212(r) of the Act, 1182(r)¹.

The regulation at 8 C.F.R. § 212.15(k) states, in pertinent part, the following:

Standards for credentialing organizations. [CIS] will evaluate organizations, including CGFNS, seeking to obtain approval from [CIS] to issue certificates for health care workers, or certified statements for nurses. Any organization meeting the standards set forth in paragraph (k)(1) of this section can be eligible for authorization to issue certificates. . . . All organizations will be reviewed, including CGFNS, to guarantee that they continue to meet the standards required of all certifying organizations, under the following:

(1) *Structure of the organization.*

(i) The organization shall be incorporated as a legal entity.

(ii) (A) The organization shall be independent of any organization that functions as a representative of the occupation or profession in question or serves as or is related to a recruitment/placement organization.

* * *

(2) *Resources of the organization.*

(i) The organization shall demonstrate that its staff possess the knowledge and skills necessary to accurately assess the education, work experience, licensure of health care workers, and the equivalence of foreign educational institutions, comparable to those of United States-trained health care workers and institutions.

¹ This ground of inadmissibility was established by section 343 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Public Law 104-208, 110 Stat. 3009, 636-37 (1996).

* * *

(3) *Candidate evaluation and testing mechanisms.*

* * *

(ii) The organization shall use reliable evaluation/examination mechanisms to evaluate individual credentials and competence that is objective, fair to all candidates, job related, and based on knowledge and skills needed in the discipline.

(iii) The organization shall conduct ongoing studies to substantiate the reliability and validity of the evaluation/examination mechanisms.

* * *

(v) The organization shall use policies and procedures to ensure that all aspects of the evaluation/examination procedures, as well as the development and administration of any tests, are secure.

* * *

(vii) The organization shall establish policies and procedures that govern the length of time the applicant's records must be kept in their original format.

* * *

(4) *Responsibilities to applicants applying for an initial certificate or renewal.*

* * *

(iv) Where examinations are used, the organization shall provide competently proctored examination sites at least once annually.

* * *

(vii) The organization shall implement policies and procedures to ensure that each applicant's examination results are held confidential and delineate the circumstances under which the applicant's certification status may be made public.

* * *

(8) *Criteria for maintaining accreditation.*

(iv) The organization shall establish performance outcome measures that track the ability of the certificate holders to pass United States licensure or certification examinations. The purpose of the process is to ensure that certificate holders pass United States licensure or certification examinations at the same pass rate as graduates of United States programs. Failure to establish such measures, or having a record showing an inability of persons granted certificates to pass United States licensure examinations at the same rate as graduates of United States programs, may result in a ground for termination of approval. Information regarding the passage rates of certificate holders shall be maintained by the organization and provided to HHS on an annual basis, to [CIS] as part of the 5-year reauthorization application, and at any other time upon request by HHS or [CIS].

* * *

On the application and supporting documents, the applicant claimed to have been established during 2001. The applicant described itself as follows: “[The applicant] is a non-profit, recognized Institute in education, registration and licensure review for nursing professional[s].” The applicant further stated, in describing the nature of its organization, that it “. . . renders independent assessment for foreign educated nurses to meet the requirements set by the Department of Homeland Security.

As to its structure the applicant stated,

[The applicant] is independent of any organization that functions as a representative of any professions or is related to a nursing recruitment or placement organization.

As to its staff’s knowledge the applicant stated, “[The applicant] has a team of specialized education evaluators that can provide information to government agencies & healthcare industries.”

As to its evaluation and testing mechanisms the pert stated,

The visa screen process is comprised of an educational assessment, and an examination of nursing knowledge. Once the applicant has successfully completed all elements of the visa screen process, the applicant is awarded a Visa Screen Certificate, which can be presented to US Consulate abroad or adjustment of status in US.

In the section of the application reserved for the applicant to explain how it meets the standards described at 8 C.F.R. §§ 212.15(k) the applicant did not indicate that it would provide proctored examinations or what policies and procedures it would institute to ensure confidentiality. The applicant also failed to describe the statistical controls it would institute to ensure that the pass rate on its examinations mirrors that of graduates of United States programs.

The acting director sought consultation with HHS as directed under 8 C.F.R. § 212.15(j)(3). The HHS found that the applicant failed to demonstrate eligibility pursuant to 8 C.F.R. § 212.15(k) and recommended denying the application. The acting director determined that the evidence submitted did not establish that the applicant was eligible to be authorized to issue certifications for health care workers, and, on March 31, 2005, denied the application. The acting director incorporated HHS’ recommendations into his decision.

On appeal the applicant requested oral argument before the AAO. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unusual factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unusual factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

The applicant notes that the Form I-905 Application for Authorization to Issue Certification for Health Care Workers and the authorization granted pursuant to it are recently instituted and that no precedent decisions nor definitive standards exist. The applicant also stated that adjudication of the instant application had far exceeded the expected 150 to 180 days. With the appeal the applicant provided a list addressing, point-by-point, the deficiencies noted in the decision of denial. The applicant's responses to those cited deficiencies generally mirrors the assertion submitted with the application, that the applicant intends to comply with the requirements of 8 C.F.R. § 212.15(k). To the extent that some of those responses contain additional detail, those responses are addressed below.

At the outset, the AAO notes that the regulation at 8 C.F.R. § 212.15(j) creates a mandatory requirement that CIS accord great discretion to HHS' recommendations upon issuance of its decision. Among preambulatory comments to issuance of the final regulation, in its section titled "*The Standards an Organization Must Meet in Order To Obtain Authorization To Issue Certificates,*" CIS stated the following, in pertinent part:

An organization seeking approval to issue certificates or certified statements ***should submit evidence*** addressing each of the standards. These standards were developed by HHS in order to ensure that an organization meets the requirements contemplated by Congress. In drafting these standards, HHS drew upon the legislative history to IIRIRA, and drew extensively from the standards of the National Commission for Certifying Agencies, a nationally recognized body that accredits certifying organizations. There are four guiding principles to the standards:

1. [CIS] should not approve a credentialing organization, unless the organization is independent and free of material conflicts of interest regarding whether an alien receives a visa;
2. The organization should demonstrate an ability to evaluate both the foreign credentials appropriate for the profession, and the results of examinations for proficiency in the English language appropriate for the health care field in which the alien will be engaged;
3. The organization should also maintain comprehensive and current information on foreign educational institutions, ministries of health, and foreign health care licensing jurisdictions; and
4. If the health care field is one for which a majority of the States require a predictor examination (currently, this is done only for nursing), the organization should demonstrate an ability to conduct the examination outside the United States.

(Emphasis added).

CIS also stated that its reliance and collaboration with HHS was out of concern that organizations issuing certificates should be held to a select group of standards to avoid unqualified organizations from issuing certificates to foreign health care workers which would result in adverse consequences for health care in the United States. CIS conceded that the standards are voluminous and strict, and stated that “[a]n organization seeking approval is required to meet the majority, but not all, of the listed standards,” but also stated that “[a]n organization seeking approval to issue a health care certificate should make every attempt to **submit evidence addressing each of the criteria listed.**” [Emphasis supplied.]

I. The applicant failed to submit evidence showing that it meets the eligibility standards set forth at 8 C.F.R. § 212.15(k)(1)(ii)(A).

This regulation requires that the applicant “be independent of any organization that functions as a representative of the occupation or profession in question or serves as or is related to a recruitment/placement organization.

On the application the applicant stated that it “is independent of any organization that functions as a representative of any professions or is related to a nursing recruitment or placement organization,” but provided no other evidence in support of that assertion. On appeal the applicant reiterates that assertion.

Although the applicant stated that it is independent of any such organization, it provided no evidence in support of that assertion. The applicant could, for instance, have provided documentary evidence of its founding, evidence pertinent to its founders, its bylaws, and evidence pertinent to any organizations with which it has any affiliation or by which it is funded. Merely going on record without supporting documentary evidence is insufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190)). Absent any evidence in its support, the applicant’s unsupported assertion is insufficient to sustain the applicant’s burden of proof. The applicant has not overcome this basis for denial of the application.

II. The applicant failed to submit evidence showing that it meets the eligibility standards set forth at 8 C.F.R. § 212.15(k)(2)(i).

This regulation requires the applicant to “demonstrate that its staff has the knowledge and skills necessary to accurately assess the education, work experience, licensure of health care workers, and the equivalence of foreign educational institutions, comparable to those of U.S. trained health care workers and institutions.”

The applicant stated on the Form I-905 application that its staff “has a team of specialized education evaluators that can provide information to government agencies & healthcare industries,” but provided no evidence in support of that assertion. On appeal it stated that it “has a team of experienced educational credential evaluators, legal advisors, and processing staff . . .,” but, again, did not name the members of that staff, describe their experience and other qualifications, or provide any evidence of those qualifications. The applicant did not, for instance, provide the résumés of its staff members or any other such documentation.

Absent any evidence in its support, the applicant’s assertion that its staff is qualified is insufficient to sustain the burden of proof. *Matter of Soffici*, supra. The applicant has not overcome this basis for denial of the application.

III. The applicant failed to submit evidence showing that it meets the eligibility standards set forth at 8 C.F.R. § 212.15(k)(3)(ii).

This regulation requires the applicant “use reliable evaluation/examination mechanisms to evaluate individual credentials and competence that is objective, fair to all candidates, job-related, and based on knowledge and skills needed in the discipline.”

In an addendum to the application the applicant stated that its “qualifying examination measures an applicant’s nursing knowledge and is based on what [nurses] [sic] must know and do when they practice in the United States,” it offered no additional detail.

On appeal, in addressing this issue, the applicant abstractly described the purpose of the tests it proposes to administer and the evaluations it intends to perform, but provided no evidence pertinent to those tests other than those statements.

That the applicant has designed the tests and evaluation procedures it intends to administer is not demonstrated nor even alleged. Without more concrete knowledge of the content of the evaluations and examinations this office cannot find that they meet the qualifications of the regulations. The applicant has not overcome this basis for denial.

IV. The applicant failed to submit evidence showing that it meets the eligibility standards set forth at 8 C.F.R. § 212.15(k)(3)(iii).

This regulation requires that the applicant demonstrate “conduct ongoing studies to substantiate the reliability and validity of its evaluation/examination mechanisms.”

With the application the applicant provided no evidence pertinent to its plan or its ability to assess the statistical reliability and validity of its evaluation and examination methods. The applicant did not, in fact, even address this issue in its submissions with the application.

On appeal the applicant stated that its analysis would include (1) Comparison of NCLEX-RN examination performance by Certificate holders to the performance of the failed examinations issued by the applicant, (2) Statistical analysis of the nursing components of the applicant’s examination, (3) Analysis of other variables that may influence predictability of NCLEX-RN Examination results, (4) Analysis of performance on repeat tests and (5) Comparison of the applicant’s certificate holders to the performance of all foreign nurse graduates, regardless of whether or not they have ever taken the applicant’s qualifying examination.

Essentially, the applicant states that it would undertake statistical analysis of the validity or reliability of its qualifying examination, but without specifically detailing the procedures it would employ. Further, as was noted above, no evidence is present in the file that indicates that the applicant employs a staff capable of this statistical analysis. The applicant has not overcome this basis for denial.

V. The applicant failed to submit evidence showing that it meets the eligibility standards set forth at 8 C.F.R. § 212.15(k)(3)(v).

This regulation requires the applicant to demonstrate that it will “use policies and procedures to ensure that all aspects of the evaluation/examination procedures, as well as the development and administration of any tests, are secure.”

In the materials submitted with the Form I-905 application the applicant did not address this requirement. On appeal the applicant stated that it would utilize distinguished nursing educators and clinical practitioners to

formulate the questions on its examination, that its examination questions would be formulated in a secluded location, that the examination question writers will be pledged to uphold the confidentiality of the examination questions, and that the test materials would be held in secure facilities with access permitted only to examination proctors.

If the applicant had demonstrated, rather than alleged, that it would employ those measures to protect the examination from disclosure, intentional or otherwise, that would likely satisfy the requirement of this regulation. The record contains no evidence, however, that the applicant has or will have a secure location in which to devise and store the examination. Other than the applicant's conclusory statements the record contains no evidence of the applicant's ability to safeguard the examination. Absent any supporting evidence the applicant's statements are insufficient to sustain the burden of proof. *Matter of Soffici*, supra. The applicant has not overcome this basis for denial.

VI. The applicant failed to submit evidence showing that it meets the eligibility standards set forth at 8 C.F.R. § 212.15(k)(3)(vii).

This regulation requires the applicant to "establish policies and procedures that govern the length of time [its] records must be kept in their original format." In the materials submitted with the application the applicant did not address this requirement. On appeal the applicant stated that it would keep applicant records for 15 years on computer disk and permanently on microfilm.

The record does not indicate, however, whether the examination would be computer-administered or whether it would involve a paper answer sheet and hard copy of the examination. The applicant has failed; therefore, to indicate the period of time the applicant's records would be retained "in their original format." The applicant has not overcome this basis for denial.

VII. The applicant failed to submit evidence showing that it meets the eligibility standards set forth at 8 C.F.R. § 212.15(k)(4)(iv).

The regulation provides that, "Where examinations are used, the organization shall provide competently proctored examination sites at least once annually." In the materials submitted with the Form I-905 application the applicant did not address this requirement. In response to the finding that it had failed to demonstrate its compliance with this requirement the applicant stated, on appeal,

[The applicant] has established temporary and permanent proctored examination sites in selected foreign locations, in conjunction with the NCLEX-RN examination already proctored in these foreign locations; well-established examination organization, VUE & Pearson, will be authorized to proctor the examination.

The applicant did not provide the dates upon which it has scheduled examinations or the locations at which they will be given. Further, the record contains no evidence pertinent to the qualifications of VUE & Proctor, other than the applicant's conclusory assertion that they are a well-established examination firm. Further still, the applicant has asserted, but not demonstrated, that VUE & Proctor is qualified to proctor the examination. Finally, the applicant provided no evidence that VUE & Pearson has agreed to proctor, or even been asked to proctor, the examination. The applicant has alleged, but not demonstrated, that it will comply with the regulations and that VUE & Pearson will proctor the examination. Again, the applicant's assertions are an insufficient substitute for evidence and the applicant has not overcome this basis for denial of the application.

VIII The applicant failed to submit evidence showing that it meets the eligibility standards set forth at 8 C.F.R. § 212.15(k)(4)(vii).

This regulation requires that the applicant,

. . . implement policies and procedures to ensure that each applicant's examination results are held confidential and delineate the circumstances under which the applicant's certification status may be made public.

On the application and supporting materials the applicant did not address this requirement. On appeal the applicant stated,

All applicant examination results are confidential. The release of applicant's examination result, personal data and other relevant information must first be obtained from the applicant by signing a[n] 'Authorization to Release to Third Party' form. If the U.S. Consulates abroad or the State Board of Nursing wish to verify the authenticity of the Credential Certificate, they may write to the API for verification. All third party inquiries must first obtain a written authorization from the applicant before any confidential information will be released.

In so stating the applicant indicates that it will not willingly, absent appropriate permission, authorize release of test results to third parties. The applicant did not indicate, however, where or in what form examination results will be stored, or how unauthorized access to them will be prevented. The applicant has not overcome this basis for denial.

IX The applicant failed to submit evidence showing that it meets the eligibility standards set forth at 8 C.F.R. § 212.15(k)(8)(iv).

This regulation requires the applicant to establish statistical checks to see that the NCLEX-RN pass rate of its certificate holders mirrors that of graduates of U.S. nursing schools. In the application and supporting materials the applicant did not address this requirement. On appeal the applicant stated,

To ensure the accuracy and comprehensiveness of the Statistics, [the applicant] collects NCLEX-RN examination results of foreign nurse graduates directly from NCLEX. Although NCSBN [National Counsel of State Boards of Nursing] approved the project, results were considered the property of the NCSBS board. [The applicant] uses the same format [as] the NCLEX-RN Test Plan to insure that examinees possess the same knowledge and testing skills as the graduates of the United States programs; [the applicant] insure that the passing rate for those who have taken the [applicant's] Certification examination achieves the same or exceeds the graduates of the United States programs for the NCLEX-RN examinations. Information regarding the passage rates of Certificate holders shall be maintained by [the applicant] and provided to the HHS and DHS as part of the five years authorization process.

[Grammatical and spelling errors in the original.]

The applicant failed to explicitly state how it will gather statistics and what statistics it will gather to show that the NCLEX-RN pass rate of its certificate holders mirrors that of graduates of U.S. nursing schools. The applicant has not overcome this basis for denial of the application.

X. Conclusion.

To demonstrate its eligibility the applicant made many assertions without any corroborating evidence. It merely quoted or paraphrased the language of the regulations and stated that it met or would meet those requirements. Thus, to summarize the detailed decision above, the applicant has failed to provide information and evidence showing that it meets the majority of the standard criteria.

The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden.

ORDER: The appeal is dismissed.