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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: EAC 02 265 50713 Office: VERMONT SERVICE CENTER Date: AUG 11 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner 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 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 licensing credentials required by the regulations applicable to the admission of registered nurses under Schedule A, Group I. The director also found that the notice of filing the Application for Alien Certification was not properly provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

On appeal, the petitioner, through counsel, asserts that the petitioner satisfied the applicable posting requirements for the position offered.

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.

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 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 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.[1] 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.

The employer must also comply with the procedure set forth to post the availability of the job opportunity to interested U.S. workers. The regulation at 20 C.F.R. § 656.20(g)(1) provides:

> In applications filed under §§ 656.21 (Basic Process), 656.21a (Special Handling) and 656.22 (Schedule A), the employer shall document that notice of the filing of the application for Alien Employment Certification was provided:
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> (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment.
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> (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice shall be posted for at least 10 consecutive days. The notice shall be clearly visible and unobstructed while posted and shall be posted in conspicuous places, where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a)

If an application is filed under the Schedule A procedures, the notice must contain a description of the job and rate of pay, must state that the notice is being provided as a result of a filing of an application for a permanent alien labor certification, and must state that any person may provide documentary evidence relevant to the

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[1] On October 2, 2002, the Department of Labor 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).

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).

In this case, the immigrant visa petition was filed on August 15, 2002. The ETA-750A accompanying the petition establishes that the position of registered nurse pays $24.79 per hour. The petitioner initially failed to submit sufficient evidence that the beneficiary had either passed the CGFNS examination or that she holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment. The director also determined that the petitioner had failed to submit sufficient evidence that it had properly provided a notice of filing Form ETA-750, to the bargaining representative or had posted the job opportunity at the employment facility or location of the employment.

On February 18, 2003, the director instructed the petitioner to provide evidence that the beneficiary has passed the CGFNS examination, or that she holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment, or that she had passed the RN-NCLEX examination and is eligible to be licensed in the state of intended employment as shown by a letter from that state. The director also requested the petitioner to submit evidence that it had notified the bargaining representative or, if no bargaining representative, had properly posted the notice of filing the ETA- 750 in a conspicuous place at the location of employment.

In response, counsel submitted copies of statutory provisions applicable to immigrant visa applicants, a copy of a letter from the Office of Examinations of the Service, now CIS, dated January 28, 1997, and a copy of a 1996 Department of State cable. Counsel failed to submit any evidence with his response showing that the beneficiary had passed any licensing examination or that she holds a state nursing license. Citing prior CIS policy, the Office of Examinations letter, and the State Department cable, counsel asserts that a petitioner does not need to submit evidence of the beneficiary's passage of the CGFNS or NCLEX-RN examination, or show state licensure in conjunction with the submission of an I-140 based on an application for Schedule A labor certification.

With his response, counsel also submitted a copy of an undated job posting describing 64 openings for registered nurses at the stated rate of pay set forth in the petitioner's Form ETA-750A contained in the record, as well as photocopies of four advertisements describing various nursing positions and inviting interested applicants to come to an "open house " to be held in early 2002. These photocopies indicate that they may have appeared in "Nursing Spectrum." A fifth advertisement contains descriptions for openings for medical personnel other than registered nurses. Counsel claims in his cover letter that the job posting was placed on the petitioner's bulletin board on or about August 25, 2002, and remained until September 29, 2002. He also states that the advertisements are copies of notices placed in various newspapers and represent the petitioner's continuous recruitment efforts.

The director denied the petition, finding that the petitioner had failed to establish that the beneficiary has passed any U.S. licensure examinations or holds a full and unrestricted license to practice nursing in the state of intended employment. The director also denied the petition because the petitioner had failed to provide satisfactory evidence that it had properly posted the notice of filing of the ETA-750 and job opening as of the petition's priority date.

On appeal, counsel disputes only the director's conclusions regarding the insufficiency of the evidence that the notice of filing the ETA-750 and job opportunity were not properly accomplished. Counsel asserts on appeal that the petitioner mistakenly reported the date of the first posting of the job notice as August 25, 2002, rather than the actual date of July 15, 2002. Counsel now claims that the petitioner's personnel office states

that the notice was posted from July 15, 2002 until September 29, 2002, when it was supposed to be removed. Counsel states, however, that it was never removed. He further maintains that the copies of advertisements were only submitted in order to show the petitioner's need for registered nurses.

The regulation at 8 C.F.R. § 103.2(b)(12) states, in pertinent part:

> An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility *at the time the application or petition was filed* (Emphasis supplied).

In this case, notwithstanding counsel's assurances to the contrary, the record contains no first-hand evidence from the petitioner that the applicable posting was completed for ten consecutive days prior to the visa priority date of August 15, 2002. Evidence of such posting should be submitted with the Application for Alien Employment Certification establishing that an attempt to provide notice to any interested U.S. applicant has been completed. Counsel's assertion on appeal that the petitioner now affirms that the posting was actually initiated on July 15, 2002 does not constitute evidence and will be rejected. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). 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).

It is further noted that the petitioner's posting of the registered nurse position does not comply with 20 C.F.R. § 656.20(g)(3)(iii), which, as noted above, requires the employer to state "that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor." The petitioner's job posting contained in the record advises interested applicants that they may contact the "Personnel Office, the Nurse Recruiter, the Director of Nursing or the New York State Department of Labor" . . . , and therefore does not conform to the regulatory requirement.

As the petitioner has not submitted evidence that a proper job offer posting had occurred pursuant to 20 C.F.R. § 656.20(g)(3), as of the filing date of the Application for Alien Employment Certification and Form I-140, the petitioner has not established eligibility as of the priority date of the petition. Consequently, the petition may not be approved .

The AAO also concurs with the director's denial of the petition because the petitioner submitted no evidence that the beneficiary has passed either the CGFNS or NCLEX-RN examination, or holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment, as of the visa priority date, pursuant to 20 C.F.R. § 656.22(c)(2) . Therefore, for this additional reason, the petition cannot be approved because the beneficiary's qualifications for the position offered were not established as of August 15, 2002. *See Matter of Katigbak,* 14 I&N Dec. at 49.

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.