U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: EAC 02 257 53650 Office: VERMONT SERVICE CENTER Date:

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

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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 blanket labor certification pursuant to 20 C.F.R. § 656.10(a), commonly referred to as Schedule A. The director determined that the petitioner had not established that the beneficiary met the qualifications for Schedule A designation and that the petitioner had not established that notice of the position was given in accordance with 20 C.F.R. § 656.20(g). Accordingly, the director denied the petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3) of the Act states, in pertinent part:

> (A) In general. - Visas shall be made available . . . to the following classes of aliens who are not described in paragraph (2):
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> (i) Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.
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> (ii) Professionals. – Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Furthermore, 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

> (B) *Skilled workers.* If the 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 minimum requirements for this classification are at least two years of training or experience.
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> (C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The regulation at 20 C.F.R. § 656.10(a)(2) states 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 [Applications for labor certification for Schedule A occupations.] (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 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.

20 C.F.R. § 656.20(g) states, in pertinent part:

> (1) 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.
> >
> > (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility of location of the employment.

The regulation at 656.20(g)(3) states,

> Any notice of the filing of an Application for Alien Employment Certification shall:
>
> (i) state that applicants should report to the employer, not to the local Employment Service office;
>
> (ii) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity; and
>
> (iii) 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.

Eligibility in this matter hinges on the petitioner demonstrating that, on the filing date of the petition, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition was filed on August 5, 2002. The Form ETA 750 specifies that the position requires a bachelor's degree in nursing and licensure as a registered nurse in the same country where the degree was obtained. The petitioner must also demonstrate that, as of August 5, 2002, the beneficiary possessed the qualifications imposed by the regulations.

With the petition counsel submitted a letter, dated July 26, 2002, in which he stated that he was attaching the beneficiary's CGFNS. None of the documentation provided with the petition, however, pertains to the CGFNS. Counsel also failed to provide any evidence that notice of the position was given to the employees' bargaining representative or posted at the place of employment.

On February 25, 2003, the Vermont Service Center requested additional evidence. Specifically, the Service Center requested a copy of the beneficiary's CGFNS Certificate or license to practice nursing in the state of intended employment. The Service Center also requested evidence that the petitioner had complied with the notice posting requirements of 20 C.F.R. § 656.20(g)(1).

Counsel responded in a letter dated April 10, 2003. In that letter, counsel noted that he was submitting a copy of a letter previously sent to a union president. That letter, dated October 24, 2002, is from the petitioner's Director of Human Resources to the president of the Service Employees International Union in Harrisburg, Pennsylvania. In that letter, the Human Resources Director gives a purported history of the petitioner's attempt to recruit foreign nurses and states that the union president was previously aware of that attempt. Counsel provided no other evidence of compliance with 20 C.F.R. § 656.20(g)(1) and did not otherwise address its requirements

Counsel also provided a photocopy of a letter, dated December 28, 2002, from the Board of Nurse Examiners in Saipan, Northern Marianas as proof that the beneficiary had passed the NCLEX examination. That letter states that the beneficiary passed the NCLEX-RN examination that she took on December 17, 2002. Counsel states that this letter demonstrates the beneficiary's eligibility for the proffered position.

The director determined that the evidence submitted did not demonstrate the beneficiary's eligibility for the proffered position on the priority date and noted that the record contains no evidence that a notice of the position was posted in accordance with the requirements of 20 C.F.R. § 656.20(g)(1). The director denied the petition on June 6, 2003.

On appeal, counsel submits what purports to be a notice of the proffered position, which states that it was posted on May 6, 2002. Counsel states that the notice was posted outside the petitioner's personnel office from May 6, 2002 through June 14, 2002. Counsel asserts that the petitioner, therefore, not only provided the October 24, 2002 to the bargaining representative in accordance with 20 C.F.R. § 656.20(g)(i) but also posted a notice of the proffered position at the location of the intended employment, in accordance with 20 C.F.R. § 656.20(g)(ii).

The notice posted at the petitioner's place of business is insufficient. It does not conform to the requirement of 20 C.F.R. § 656.20(g)(3)(iii) that it 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. In addition, 20 C.F.R. § 656.20(g)(1) makes clear that posting at the place of intended employment is effective only if the petitioner's employees have no bargaining representative. In cases where the petitioner's employees have a bargaining representative, notice must be provided to the bargaining representative as described in 20 C.F.R. § 656.20(g)(1)(i).

The letter of October 24, 2002 is also insufficient to show that notice was given in accordance with 20 C.F.R. § 656.20(g). Although that letter purports to update a union president on the progress of the petitioner's recruitment attempts and states that the union was previously aware of those attempts, it does not conform to the requirements of 20 C.F.R. § 656.20(g)(3)(i) and (iii), which require, respectively, that the notice "state that applicants should report to the employer, not to the local Employment Service Office", and "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." That letter is certainly not convincing evidence that notice conforming to those requirements was given to the union representative in advance of filing the petition in this matter, especially as it is dated after the petition was filed.

The December 20, 2002 memo from the Office of Adjudications of the INS superceded previous cables and memos, insofar as they might conflict. That memo makes clear that the beneficiary must (1) have a letter from the state of intended employment stating that he or she passed NCLEX-RN examination and is eligible for a nursing license, (2) have passed the CGFNS examination, or (3) currently have a license to practice nursing in the state of intended employment.

The petitioner must demonstrate, however, that the beneficiary was eligible for the proffered position on the priority date of the petition, which, in the case of a petition seeking Schedule A classification, is the date the petition was filed. *See Matter of Wing's Tea House, supra.* The priority date of the instant petition is August 5, 2002.

The record contains no indication that the beneficiary had passed the CGFNS examination or the NCLEX-RN examination prior to the priority date, and no evidence that the beneficiary holds a nursing license in the state of intended employment. Thus, the petitioner has not proven that the beneficiary is qualified for the position. Counsel asserts on appeal that requiring that evidence at this point in the petition process is a change of CIS policy. Even if it is, the Request for Evidence was sufficient notice of the change in policy, if any notice was necessary that CIS intended to enforce the regulations. Further, counsel made clear in his brief that he does not contend that this asserted change in policy somehow renders the instant petition approvable.

An additional issue exists pertinent to the acceptability of the December 28, 2002 letter from Saipan. The December 20, 2002 INS memo, described above, provides that 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 is acceptable in lieu of the beneficiary either having passed the CGFNS examination or currently having a license to practice

nursing in that state. The state of intended employment is Pennsylvania, not Saipan. The letter submitted is not from the state of intended employment and does not state that the beneficiary is eligible to receive a nursing license in that state.

The petitioner has failed to show that the beneficiary was eligible for the proffered position on the priority date, and has failed to show that a sufficient notice of the position was provided to the appropriate bargaining representative or posted in accordance with the requirements of 20 C.F.R. § 656.20(g). 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.