U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: EAC 02 173 51881 Office: VERMONT SERVICE CENTER Date: AUG 2 1 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

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 denied the petition accordingly.

On appeal, counsel submits a brief.

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:
>
> > (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.

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 April 24, 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 April 24, 2002, the beneficiary possessed the qualifications imposed by the regulations.

With the petition counsel submitted a letter, dated February 16, 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 September 19, 2002, 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 requirements of 20 C.F.R. § 656.20(g)(1).

Counsel responded in a letter dated January 31, 2003. In the letter, counsel stated that the beneficiary had not yet passed the CGFNS and did not have a license to practice nursing in Pennsylvania. Counsel asserted, however, that proof of meeting those alternative requirements is not required for approval of the petition.

In addition, counsel submitted a letter, dated October 24, 2002, 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.

The director determined that the evidence submitted did not demonstrate the beneficiary's eligibility for the proffered position on the priority date and denied the petition on April 4, 2003.

On appeal, counsel asserts that since 1997 the INS, now CIS, has allowed favorable adjudication of I-140 petitions for nurses without submission of evidence that the beneficiary has passed either the CGFNS or NCLEX-RN examination, and without evidence that the beneficiary holds a license to practice nursing in the state of intended employment. As support for that position, counsel submits copies of an INS, the predecessor agency of CIS, memo and a cable from another agency to its diplomatic and consular posts. Both the cable and the memo are pertinent to foreign health care workers. Counsel stated,

> This is **not** to say that petitioner is claiming that petitioner is entitled to approval merely because [CIS] has previously granted these types of applications without the beneficiary possessing CGFNS or NCLEX, and that [CIS] must do so in this case. **Rather, it is to point out that the petitioner has followed what appears to be** [CIS] **policy and considers this to be a change of current policy.**

(Emphasis in the original.)

Counsel asserted, in his letter of January 31, 2003, that proof of passage of the CGFNS or the NCLEX is not required as evidence of the beneficiary's qualifications for Schedule A designation. The regulation at 20 C.F.R. § 656.22 (c)(2), set out above, clearly contradicts counsel's assertion.

The cable from another agency to its diplomatic and consular posts is clearly not binding on the adjudications of this office. Both that cable and the INS memo relate to excludability, whereas the decision today is pertinent to whether the instant petition is approvable. Further, even if the cable and memo were salient to the issues of this case, the December 20, 2002 memo from the Office of Adjudications of the INS superceded that cable and memo, insofar as they might conflict. That memo makes clear that the beneficiary must (1) have passed NCLEX-RN examination, (2) have passed the CGFNS examination, or (3) currently have a license to practice nursing in the state of intended employment.

The record contains no indication that the beneficiary has passed the CGFNS examination or the NCLEX-RN examination, 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.

Beyond the decision of the director, this office notes that the petitioner has provided no evidence that it complied with the requirements of 20 C.F.R. § 656.20(g)(1). Although the letter of October 24, 2002 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 petition should also have been denied on that basis. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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.