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

U.S. Citizenship and Immigration Services

[redacted]

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APR 2 9 2005

FILE: EAC 02 244 51520 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

DISCUSSION: The preference 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 denied the petition after determining that the petitioner had not provided evidence that the notice of filing was provided to the bargaining representative or posted according to the regulations at 20 C.F.R. § 626.20(g)(1).

On appeal, counsel submits a brief and another copy of an undated posting notice.

Section 203(b)(3) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1153(b)(3), 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 or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. This section also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 July 17, 2002. Aliens who will be permanently employed as professional nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.10 for 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. Also, according to 20 C.F.R. § 656.10, aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, or (2) hold a full and unrestricted license to practice professional nursing in the state of intended employment.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA-750 at Part A) in duplicate with the appropriate CIS office. Pursuant to 20 C.F.R. § 656.22, the Application for Alien Employment Certification shall include:

1. Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.

2. Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

With the initial petition, the petitioner provided copies of the beneficiary's bachelor of science in nursing degree, academic transcripts, and license to practice in the Philippines. Because the evidence was insufficient to adjudicate the petition, the director issued a request for evidence on January 21, 2003 requesting the

petitioner's posting notice pursuant to 20 C.F.R. § 656.20(g)(1), and proof of the beneficiary's passage of the CGFNS examination or an unrestricted license to practice nursing in the state of intended employment pursuant to 20 C.F.R. § 656.10. In response, counsel submitted a copy of section 212(a)(5)(C) of the Immigration and Nationality Act; a copy of section 204.5 of Title 8 of the Code of Federal Regulations; a copy of a memorandum from the Office of Examinations of the Immigration and Naturalization Service, dated January 28, 1997; a copy of a cable dated December 1996 from the Department of State; a copy of a letter stating that the beneficiary passed the NCLEX-RN examination on April 26, 2002; a copy of the beneficiary's New York State Nursing license dated February 19, 2003; and an undated posting notice[1]. Counsel stated:

> Although the NCLEX does [sic] is not specifically for the State of New York, it is recognized by the State of New York and has been used as the basis by the State of New York as a requirement in order for the State of New York to issue beneficiary a full and unrestricted license to practice in the State of New York as a registered nurse. I have attached as **Exhibit 2** proof of licensure of the beneficiary as a full and unrestricted registered professional nurse by the State of New York, the state of intended employment. Despite not having the New York State licensure prior to the date of filing, beneficiary remains qualified for issuance of an approval of the application for an approved I-140.
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> The reason is that the [Immigration & Nationality Act] and [CIS] regulations do not require that the beneficiary present CGFNS, the visa screen, TWE, TSE, or TOEFL prior to an appearance at either the Consulate where the beneficiary is being interviewed for issuance of an immigrant visa, or at [a CIS] office during an adjustment interview.

Counsel references sections 212(a)(5)(C) of the Act and 8 C.F.R. § 204.5 for the proposition that submitting proof of the beneficiary's CGFNS certificate or license is only a ground of inadmissibility during consular processing or adjustment of status and not a requirement at the I-140 stage. Counsel also references a CIS memorandum dated January 28, 1997 from the Office of Examination as well as a cable of instructions issued by the Secretary of State in December 1996.

The director denied the petition on June 6, 2003 after determining that the petitioner had not provided evidence that the notice of filing was provided to the bargaining representative or posted according to the regulations at 20 C.F.R. § 626.20(g)(3).

Under 20 C.F.R. § 656.20, the regulations require the following:

> 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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[1] It is noted that counsel asserts that the notice was posted from July 15, 2002 to August 30, 2002.

(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 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).

Upon submission of the posting notice on appeal, counsel states the following:

> Please be advised that the petitioner posted the notice to employees on a bulletin board in the Personnel Office from July 1, 2002 until August 30, 2002. The previous information given to the Service Director that the notice was posted on July 15, 2002 until August 30, 2002 was incorrect. A copy of the notice is attached hereto as **Exhibit 1.**
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> The posting was not dated. As to the posting itself, the fact that the posting was not dated lead to petitioner's confusion in reporting the wrong date. However, the personnel office confirmed that the actual date it was posted was Monday, July 1, 2002. Inasmuch as the filing was made on the 17th of July, 2002, the petitioner gave the proper notice to its employees through its posting.

(Emphasis in original). It is noted that even on appeal, the notice of posting is still undated and counsel has not provided a statement from the personnel office confirming the dates of the posting. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8).

In addition, at the time of filing, July 17, 2002, according to 20 C.F.R. § 656.10, aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, or (2) hold a full and unrestricted license to practice professional nursing in the state of intended employment. The beneficiary had neither passed the CGFNS examination nor held an unrestricted license to practice professional nursing in the state of intended employment. The beneficiary passed the NCLEX examination on April 26, 2002. However, CIS did not add the NCLEX

examination as a requirement in lieu of either having passed the CGFNS examination or being in possession of a full and unrestricted license to practice nursing in the state of intended employment until December 2002. At that time, CIS also required a certified letter from the state of intended employment which confirms that the alien has passed the NCLEX-RN examination and is eligible to be issued a license to practice nursing in that state. The record shows that the beneficiary was not qualified at the time of filing and, indeed, never fulfilled the requirements after. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Beyond the decision of the director, it is noted that the petitioner has not provided evidence of its continuing ability to pay the proffered wage from the priority date.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with CIS. *See* 8 C.F.R. § 204.5(d). Here, the petition was filed on July 17, 2002. The proffered salary as stated on the labor certification is $25.34 per hour (36 hours) or $47,436.48 per year.

As no evidence of the petitioner's ability to pay the proffered wage was submitted,[2] the petition must also be denied.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

[2] It is noted that the director failed to request this evidence.