U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 19 2005

WAC 04 047 50947

IN RE: Petitioner:

Beneficiary: [redacted]

PETITION: 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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a heath care firm. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for 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).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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.

The regulation at 20 C.F.R. § 656.22 provides in pertinent part:

> (a) An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification in duplicate with the appropriate [Citizenship and Immigration Services (CIS)] office, not with the Department of Labor or a State Employment Service office.
> (b) The Application for Alien Employment Certification form 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. There is, however, no need for the employer to provide the other documentation required under § 656.21 of this part for non-Schedule-A occupations.
> (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 § 656.20(g)(3) of this part.
> (c) An employer seeking labor certification under Group I of Schedule A shall file, as part of its labor certification application, documentary evidence of the following:
> (1) [Provisions related to physical therapists].
> (2) 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. 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.

Eligibility in this matter hinges on the qualifications of the beneficiary for the position at the priority date. Employment-based petitions depend on priority dates. The priority date for Schedule-A occupations is established when the I-140 is properly filed with CIS, formerly the Service or the Immigration and Naturalization Service (INS). 8 C.F.R § 204.5(d). The petition must be accompanied by the documents

required by the particular section of the regulations under which it is submitted. 8 C.F.R. § 103.2(b)(1). The priority date of the petition in this case is December 8, 2003.

The petitioner initially submitted insufficient evidence of the beneficiary's qualifications for the position. In a request for evidence (RFE), dated May 13, 2004, the director asked the petitioner to provide a full and unrestricted license to practice professional nursing in the state of intended employment, a certificate that the beneficiary had passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) examination, or a letter from the state of intended employment confirming that the beneficiary has passed the National Council Licensure Examination for registered nurses (NCLEX-RN) and that he or she is eligible for an RN license in that state. *See* 20 C.F.R. § 656.10, Schedule A, Group I. He also asked for proof of the local prevailing wage rate.

In response, counsel provided:

- The petitioner's signed statement amending its pay rate to $21.30 an hour, an amount within 5 percent of the prevailing rate for nearby counties;
- A copy of a letter from the state employment services office showing the prevailing hourly rate for registered nurses to be$22.43; and,
- A temporary California professional nursing license good through November 26, 2004, evidencing the beneficiary's eligibility to practicing nursing in California.

On September 23, 2004, the director determined that the petitioner's evidence did not show that the petitioner had properly posted, within 10 days of filing the petition, a work-place notice of the job and the proffered wage, and that posting a notice of the amended rate of pay constituted a material change to the petitioner, without prejudice to a new filing of the petition with proof of a proper posting. Further, the director found the petitioner did not establish that the beneficiary either passed the CGFNS examination, had a full and unrestricted license from the California board of nursing, or passed the NCLEX-RN and submitted a letter from the state of intended employment confirming that the beneficiary is eligible to practice nursing in that state. The director concluded that the beneficiary did not qualify for certification under Schedule A and denied the petition.

Counsel, on appeal, states that the director should have honored the Nevada state certification of the beneficiary's passing the NCLEX-RN, even though the beneficiary took and passed it outside the state of intended employment.[1] He further stated that the beneficiary has since obtained a permanent California license to practice as a registered nurse. He further stated, through counsel's own inadvertence, that the petitioner posted notice of the amended wage offer for 10 days starting July 26, 2004.

The statute relates eligibility for the benefit to the status of the license and examinations at the date of the I-140 petition for classification, the priority date. *See* § 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), *supra.*

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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 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 the I-140 petition for a foreign nurse, as being eligible for a Schedule A labor certification, upon presentation of a certified copy of a 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." *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).

The record reflected no license or certificate of examination at the priority date. It did not meet the requirement of licensure or eligibility at the priority date.

A petitioner must establish the elements for the approval of the petition at the priority date. 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).

The petitioner's evidence fails to establish either that, prior to the priority date, the California nursing board had granted the beneficiary's full and unrestricted nursing license or that the beneficiary had passed either the CGFNS examination or the NCLEX-RN exam, and in the latter case additionally had a letter from the state of intended employment confirming that the beneficiary is eligible to practice nursing in that state. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel states under oath that he posted the amended wage and job offer after the priority date. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, a timely posting of the notice is mandatory requirement intended to ensure fairness to U.S. workers who might otherwise not compete for the job with job candidates who are aliens from other countries.

The petition was not accompanied by evidence that the beneficiary qualified for classification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I, as of the priority date of the petition. As the petitioner has not complied with the instructions stipulated in the Department of Labor regulations, at the time of the filing of the petition, the petition may not be approved.

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.