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

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 21 2005
WAC 04 047 50816

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 immigrant visa petition was denied by the director of the California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be denied.

The petitioner is a residential health facility. It seeks to permanently employ the beneficiary 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, Schedule A, Group I.

The director denied the petition, finding that the petitioner did not submit evidence that the notice was timely posted, and accordingly the disregarded the petitioner's late posting and found the notice failed to offer the prevailing wage rate. On appeal counsel said by an oversight he had not submitted a copy of the late posting with the correct wage offer. The petitioner by sworn declaration states the posting occurred for 10 days and is dated soon after the RFE requested the information.

On appeal, counsel submits additional evidence and a brief.

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.

The petitioner has filed a Form I-140 petition, on December 7, 2003, seeking classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse. Aliens who will be permanently employed as professional nurses are eligible for certification as a Schedule-A occupation without Department of Labor processing.

The regulation specifies that for Schedule-A certification, an employer must file an Application for Alien Employment Certification (Form ETA-750 at Part A) in duplicate with the appropriate Citizenship and Immigration Service (CIS) office. Pursuant to 20 C.F.R. § 656.22, the ETA 750 must include evidence of a prearranged employment for the beneficiary and notification of filing the ETA 750 going to a workers' bargaining representative or otherwise meeting the notice requirements of 20 C.F.R. § 656.20(g)(3).

With the petition, the petitioner also submitted:

- An uncertified ETA 750 application;
- Written notice that the beneficiary on August 28, 2003, in Las Vegas, Nevada, had taken and passed the NCLEX-RN examination; and,
- A Nevada state-licensing agency letter dated September 3, 2003, declining to issue a nursing license to the beneficiary until he shows he holds a U.S. Social Security number.

On May 13, 2004, the director, issued a request for evidence (RFE), seeking:

- Verification that the ETA-750 proffered wage of $20 an hour satisfied "the local prevailing wage" requirements, and,
- Proof that the beneficiary has passed California's CGFNS examination or holds an unrestricted California license, or is board eligible for licensure based upon his having passed California's NCLEX-RN examination.[1]

[1] The RFE noted the proof that the beneficiary met the licensing qualifications came from the state of Nevada

In response, counsel submitted:

- The petitioner's letter dated August 4, 2004, offering an hourly wage increased to $21.30; and,
- A state of California employment office letter dated July 26, 2004, stating that the prevailing registered nurse's wage for California's Napa, Solano and Sonoma counties is $21.30 an hour; and,
- A copy of a six-month license the state of California issued to the beneficiary on May 26, 2004.

On September 23, 2004, the director denied the petition because the petitioner had not shown that the beneficiary met any of the qualifying tests for Schedule-A certification, or that it had duly posted notice of filing an ETA 750 with the revised hourly wage of $21.43. More specifically, the director found no showing of the beneficiary having passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, or of his holding a full and unrestricted California license to practice professional nursing, or of having received a "certified letter from the state of intended employment declaring that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN)." The director found inadequate petitioner's proof of temporary California RN licensure or the letter from Nevada certifying the beneficiary had passed the NCLEX-RN. The director also found the petitioner had not given due notice of filing the wage amendment to the ETA 750 as required by 20 C.F.R. § 656.20(g)(1).

On appeal, counsel submits:

- Counsel's November 24, 2004 declaration of his inadvertent failure to submit Petitioner's notice of posting of the amended wage;
- The petitioner's July 26, 2004 certification of posting, at its business in Santa Rosa, California, for 10 consecutive days, a notice of full-time job openings for seven-to-ten registered nurses at $22.43 an hour; and,
- A photocopy of the front side of the beneficiary's California registered-nursing license certificate that states the license expires on June 30, 2006.

Counsel asserts the director erred in requiring the beneficiary to have passed the California NCLEX-RN, "even if not in the state of intended employment." He notes Nevada had ultimately withheld a license because the beneficiary had no Social Security number (SSN),[2] but asserts "compliance with the [licensure] requirement" because of the beneficiary's permanent license in California.[3] Having submitted a copy of a certificate of his permanent California nursing license on appeal suggests that he had not previously had the state's license, either at the time of filing or of the director's denial.

The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the Department of Labor by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). However, the instant petition is governed by the prior regulations. The citations below are to the Department of Labor regulations as in effect prior to the PERM amendments. The new regulations are, in

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rather than from California, where the intended job site would be.

[2] The legacy Immigration and Naturalization Service's (INS) December 20, 2002 memorandum advised directors to "favorably consider" foreign nurse petitions "upon presentation of a certified copy of a letter from the state of intended employment" indicating the beneficiary passed the NCLEX-RN examination and was eligible for licensure in that state.

[3] The submitted California certificate does not display a date of issuance.

many respects, the same as the former regulations at 20 C.F.R. § 656.10 and 20 C.F.R. § 656.22.[4] Since the petitioner filed the instant petition prior to the new regulations, the controlling regulation, 20 C.F.R. § 656.10[5], in effect for Schedule-A petitions filed prior to March 28, 2005, provides, in part:

> An alien seeking a labor certification for an occupation listed on Schedule A may apply for that labor certification pursuant to Sec. 656.22 [Schedule A, Group I]:
>
> * * *
>
> (2) Aliens who will be employed as professional nurses; and (i) who have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination; or (ii) who hold a full and unrestricted license to practice professional nursing in the State of intended employment.

Additionally, the regulation at 20 C.F.R. § 656.22(c)(1) and (c)(2) also states:

> * * *
>
> (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 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.[6] 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.

This appeal hinges on whether or not the documentation submitted for Schedule-A labor certification met the requirements for a Schedule-A nurse in place at the time of filing. The director found the evidence insufficient because "the letter from the State of Nevada [regarding the beneficiary's passing the NCLEX-RN examination] is not a letter from the state of intended employment."

Acting Associate Commissioner Cook's December 20, 2002 memorandum states that, to be approvable, a nurse would need to have 1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) examination, 2) held a full and unrestricted permanent license to practice nursing in the state of intended employment, or 3) passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), and have "a certified copy of a letter from the state of intended employment confirming that the nurse had passed the NCLEX-RN examination and is eligible to be issued a license to practice nursing in that state."

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[4] *See* 69 Fed. Reg. (Dec. 27, 2004) 77386.

[5] A superseding regulation, 20 C.F.R. § 656.15, became effective for applications filed on or after March 28, 2005. *See* 69 Fed. Reg. (Dec. 27, 2004) 77326.

[6] 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 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." [Emphasis added] *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).

Based upon the authority just cited, where a beneficiary takes the test is immaterial. While the director correctly noted that one way of satisfying the regulations governing Schedule-A processing is for the employer to submit a letter from the state of intended employment declaring the beneficiary has passed the NCLEX-RN and is otherwise eligible for licensure, that is not the only way to establish the beneficiary has qualified. The beneficiary may also show passage of the CGFNS examination or may show that he /she has a full and unrestricted license in the state of intended employment. In the instant case, counsel submits a letter from the Nevada licensing authority certifying the beneficiary's passing the NCLEX-RN. While passing the NCLEX-RN may or may not have satisfied the state of California licensure's requirements, the record does not contain the required evidence of a letter from the state of California licensing authority establishing, as of the December 7, 2003, that the beneficiary qualifies for licensure. As such, the petition has not submitted sufficient evidence to show that the beneficiary qualifies for Schedule-A certification.

The director also found that the petitioner had not established compliance with public notice requirements of an application for labor certification at the job site. 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.

In the instant case, the May 13, 2004 RFE requested evidence that the proffered wage of $20 an hour, posted at the worksite on November 13, 2003, equaled or exceeded the local prevailing wage.

The director found that the petitioner did not submit evidence that the notice was posted, and accordingly the disregarded the petitioner's later posting and found the notice failed to offer the prevailing wage rate. On appeal counsel said he neglected through an oversight to submit a copy of the later posting of the amended wage offer. The petitioner by sworn declaration states the posting occurred for 10 days and is dated July 26, 2004. Counsel responded on August 4, 2004, submitting a photocopy of a prevailing wage determination by an official with the Sonoma County office of the California state employment office showing the prevailing wage to be $22.43 and hour for a registered nurse. The petitioner then posted a new job opening announcement, dated July 26, 2004, for 10 consecutive days at a rate of $22.43 an hour. However, because the proffered wage listed on the earlier notice was $20 an hour, more than 5 percent less than the $22.43 prevailing wage, the petitioner has not complied with the notice the requirements of 20 C.F.R. 656.20(g). The petitioner did not timely post a notice that contained the prevailing wage for Sonoma County, California.

The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations.[7] Since the petitioner has not established, as of December 7, 2003, that it had properly posted a

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[7] *See* the Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); *see also* Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).

notice prior to filing the petition, it could not have completed the process of considering qualified U.S. workers. This office is not persuaded that counsel and the petitioner have complied with the requirements for posting notice at the job site.

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 met that burden. The appeal will be dismissed. The petition will be denied.

ORDER: The appeal is dismissed. The petition is denied.