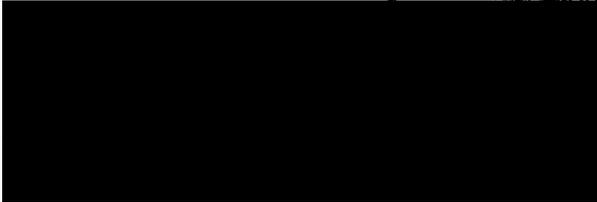


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**U.S. Citizenship
and Immigration
Services**

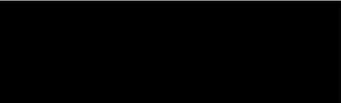
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APR 27 2015

FILE: EAC 02 241 54794 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: 
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:



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
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 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 . . . :

(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.

(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.

(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 July 12, 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 July 12, 2002, the beneficiary possessed the qualifications imposed by the regulations.

With the petition counsel submitted a letter, dated July 7, 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. Both the Form I-140 petition and the Form ETA 750 state that the petitioner would employ the beneficiary in Philadelphia, Pennsylvania.

On January 3, 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 requirements of 20 C.F.R. § 656.20(g)(1).

Counsel responded in a letter dated March 18, 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.

As to compliance with the requirements of 20 C.F.R. § 656.20(g)(1), counsel provided a copy of a "Posting." That document states that a registered nurse position is available in Southampton, Pennsylvania and states the requirements of the position. Other than its location the posting correctly describes the proffered position, although it does not identify the petitioner.

In his letter of March 18, 2003 counsel states that the posting was placed, on January 10, 2003, on a bulletin board ordinarily used to give notices to the petitioner's employees, where it remained "until the present, February 3, 2003, and it remains posted." Although counsel misstated the current date, either in the heading or the body of that letter, this office notes that, in either event, the letter would have been posted more than ten days. Counsel did not state that he personally witnessed that posting or what other basis he may have for that assertion.

The director determined that the evidence submitted did not demonstrate the beneficiary's eligibility for the proffered position on the priority date and did not demonstrate that the petitioner had complied with the requirements of 20 C.F.R. § 656.20(g)(1). The director denied the petition on June 6, 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.]

As to the requirements of 20 C.F.R. § 656.20(g)(1), counsel states that, in addition to the dates during which he previously asserted that the posting was placed on the petitioner's bulletin board, it was also placed there from June 17, 2002 to July 22, 2002. Again, counsel did not state his basis for that assertion.

Initially, this office notes that counsel's statements in response to the Request for Evidence and on appeal are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6

(1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

Further, the Form ETA 750 states that the proffered position is in Philadelphia, whereas the posting incorrectly identifies the location of the proffered position as Southampton, Pennsylvania. Even if counsel had provided competent evidence of posting in compliance with 20 C.F.R. § 656.20(g)(1), that posting, wherever it occurred,¹ would not have accorded the petitioner's employees sufficient notice of the existence of the proffered position, which is in Philadelphia.

Finally, this office notes that CIS, on January 3, 2003 requested evidence that the petitioner had posted a notice of the proffered position in accordance with the requirements of 20 C.F.R. § 656.20(g)(1). No such evidence was submitted and the petition was denied on that basis. Now, on appeal, counsel seeks to show that the notice was correctly posted pursuant to the requirements of 20 C.F.R. § 656.20(g)(1). Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and accorded an opportunity to respond to that deficiency, this office will not accept evidence relevant to that deficiency that is offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988). Even if evidence sufficient to show compliance with the requirements of 20 C.F.R. § 656.20(g)(1) were now offered, it would not now be considered for that purpose.

Counsel asserted, in his letter of March 18, 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 admissibility, 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, in his letter of March 18, 2003 and on appeal, that Service Centers previously approved petitions for registered nurses without evidence of either a CGFNS or NCLEX certificate and that requiring that evidence at this point in the petition process is a change of CIS policy.

If previous petitions were approved without evidence that the beneficiary had passed either the NCLEX or CGFNS exam, those approvals would constitute error on the part of the director. The AAO is not bound to

¹ The record contains no indication of the city in which that posting occurred, whether Philadelphia, Southampton, or elsewhere.

approve petitions where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). CIS need not treat errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1998).

Furthermore, the AAO's authority over the Service Centers is comparable to the relationship between a court of appeals and a district court. The AAO is not bound to follow the decisions of the service centers. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petitioner has not demonstrated that the beneficiary was qualified for the proffered position on the priority date, and the petition was correctly denied on that basis. The petitioner has provided insufficient evidence that it complied with the requirements of 20 C.F.R. § 656.20(g)(1) and the petition was also correctly denied on that 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.