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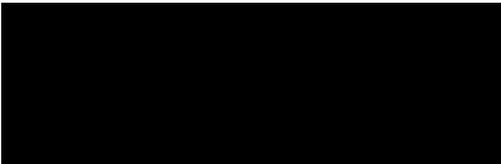
FILE: EAC 03 018 55305 Office: VERMONT SERVICE CENTER Date: AUG 24 2005

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, 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.

The regulation at 656.20(g)(3) states that,

Any notice of the filing of an Application for Alien Employment Certification shall:

- (i) state that applicants should report to the employer, not to the local Employment Service office;
- (ii) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity; and
- (iii) 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.

The regulation at 20 C.F.R. § 656.20(g)(4) states that the filing notices pertinent to applications that do not involve reduction in recruitment must contain the information required for advertisements by §§ 656.21(g)(3)

through (g)(8). The regulation at 20 C.F.R. § 656.21(g)(4) requires that the notice state the rate of pay for the position offered.

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 October 17, 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 October 17, 2002, the beneficiary possessed the qualifications imposed by the regulations.

Both the Form I-140 petition and the Form ETA 750 state that the petitioner would employ the beneficiary in Harris, New York.

With the petition counsel submitted no evidence that the beneficiary has passed the CGFNS examination, no evidence that the beneficiary holds a nursing license in New York, and no certified letter from the state of New York stating that the beneficiary has passed the NCLEX-RN and is eligible to receive a license to practice nursing in that state. 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 March 10, 2003, the Vermont Service Center requested additional evidence. Among other things, the Service Center requested (1) evidence that the beneficiary has passed the CGFNS examination, (2) evidence that the beneficiary has a full and unrestricted license to practice nursing in New York, or (3) a letter from the state of New York stating that the beneficiary has passed the NCLEX-RN and is eligible to receive a license to practice nursing in that state. 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 May 15, 2003. In the letter, counsel implied that the beneficiary had not yet passed the CGFNS or the NCLEX-RN examination and did not have a license to practice nursing in New York. Counsel asserted, however, that proof of meeting those alternative requirements is not required for approval of the petition.

As to the requirements of 20 C.F.R. § 656.20(g)(1), counsel stated, "The petitioner has a bargaining unit that represents the position that beneficiary is going to fill. Attached as Exhibit 6 please find a copy of the letter to the bargaining unit representative."

The letter to which counsel refers is dated April 15, 2003, after the priority date in this matter. It is addressed to a nursing representative at the New York State Nursing Association in Latham, New York. It states,

I am writing to inform you that Catskill Regional Medical Center is presently sponsoring 13 Registered Nurses from the Philippines for permanent residence in the United States. The 13 registered nurses will be working at Catskill Regional Medical Center, located at our facilities at



The letter provides no further description of the job and does not state the amount of the wage proffered for the position.

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 June 25, 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 May 15, 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, 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 May 15, 2003, 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, rather than a change in policy. The AAO is not bound to 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 submitted no evidence that the beneficiary is a registered nurse qualified for treatment under Schedule A pursuant to 20 C.F.R. § 656.22 as modified by the December 20, 2002 memo of the Office of Adjudications and the petition was correctly denied on that basis.

An additional issue exists in this matter that was not addressed in the decision of denial. The filing notice provided to the bargaining representative does not contain the rate of pay for the proffered position. As such, it cannot be deemed an attempt to locate qualified U.S. workers willing to accept the proffered position at that wage. Further, the filing notice does not, therefore, conform to the requirements of 20 C.F.R. § 656.20(g)(4) and 20 C.F.R. § 656.21(g)(4), described above. The petition should have been denied for this additional reason.¹

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.

¹ 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 (2^d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).