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File: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 26 2008
WAC-04-219-52012

In re: Petitioner: [Redacted]
Beneficiary: [Redacted]

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is in the business of healthcare. The petitioner seeks to employ the beneficiary permanently in the United States as registered nurse, a professional worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. For the beneficiary to qualify, the petitioner must show that it has the ability to pay the beneficiary the proffered wage, and that the beneficiary meets the qualifications set forth in the certified labor certification. 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 nature, for which qualified workers are not available in the United States.

The petitioner applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.10 with respect to 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.

Based on 8 C.F.R. § 204.5(a)(2) an applicant for a Schedule A position would file Form I-140, “accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien’s occupation qualifies as a shortage occupation within the Department of Labor’s Labor Market Information Pilot Program.” The priority date of any petition filed for classification under section 203(b) of the Act for Schedule A, Group I petitions “shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [Citizenship and Immigration Services (CIS)].” 8 C.F.R. § 204.5(d).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer’s completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer’s employees as set forth in 20 C.F.R. § 656.20(g)(3). 20 C.F.R. § 656.22(a) and (b).

The regulation at 20 C.F.R. § 656.22(c)(2) also 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 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.¹

¹ 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 CIS that it may favorably consider an I-140 petition for a foreign nurse for Schedule A labor certification

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.

The petitioner must also demonstrate the ability to pay the beneficiary the proffered wage. The regulation 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.

In the case at hand, the petitioner submitted the Application for Alien Employment Certification, ETA-750, with the I-140 Immigrant Petition on August 4, 2004, which is the priority date. The proffered wage as stated on Form ETA 750 for the position of a registered nurse is \$22.00 per hour, based on 40 hours per week, which is equivalent to \$45,760 a year, with overtime as needed to be paid at a rate of one and one-half of the regular hourly rate. On the I-140 petition filed, the petitioner listed the following information related to the petitioning entity: established: 1968; gross annual income: \$60,934,201.00; net annual income: not listed; and current number of employees: over 100 employees.

On February 1, 2005, the director issued a Notice of Intent to Deny (“NOID”). The Service Center requested that the petitioner submit a completed posting notice as required for Schedule A positions, as well as documents related to the petitioner’s ability to pay; documentation related to the beneficiary’s education to show that she met the qualifications as set forth in the ETA 750; an educational evaluation to show the equivalency of the beneficiary’s foreign education; and evidence of the beneficiary’s prior experience to show that she met the experience required in the ETA 750.

The petitioner submitted in response: the completed posting notice; the petitioner’s 2002, and 2003 federal tax returns, along with a July 2004 financial statement, and statement that the petitioner employs over 100 individuals; copies of the beneficiary’s diplomas without an evaluation (the petitioner noted that it was unable to obtain an evaluation due to the thirty day NOID response requirement); evidence of the beneficiary’s experience in the form of an affidavit from the beneficiary.

On March 14, 2005, the director then issued a Request for Evidence (“RFE”) and requested that the petitioner provide: evidence that the beneficiary met the educational requirements of the ETA 750, including that the petitioner provide an educational evaluation; and that the petitioner submit evidence of the beneficiary’s prior experience in the form of letters on letterhead, along with certified translations of any foreign documents.

In response, the petitioner submitted: evidence of the beneficiary’s education completed in China along with an educational evaluation showing that the beneficiary had the equivalent of an associate’s degree. The petitioner also submitted several letters with translations to document the beneficiary’s prior work experience.

if a certified copy of a letter from the state of intended employment is submitted showing that the alien has passed the NCLEX-RN examination. 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).

On June 22, 2005, the director denied the petition on the basis that the petitioner failed to demonstrate that the beneficiary met the requirements as set forth in the ETA 750, specifically, the ETA 750 required a Bachelor's degree for the position, and the petitioner could only document that the beneficiary possessed the equivalent of an Associate's degree. The petitioner appealed, and the matter is now before the AAO.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the "job offer" states that the position requires one year of experience in the job offered, as a registered nurse, or five years and five months in a related occupation (unspecified),² as well as six months training in direct patient care, with job duties to partially include: "provide direct nursing care to patients and to supervise the day-to-day nursing activities performed by certified nursing assistants (CNAS)." The petitioner listed educational requirements in Section 14: Bachelor's degree in Nursing, and listed other special requirements for the position in Section 15 as "NCLEX RN License or CGFNS Certificate."

A beneficiary is required to document prior education in accordance with 8 C.F.R. 204.5(l)(3)(ii)(c), which provides:

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.

Also, 8 C.F.R. § 204.5(l)(3), provides:

(ii) *Other documentation*—

² The beneficiary listed her prior experience on the ETA 750B as: (1) Ming Imperial, Herbal Inn, London, United Kingdom, Nurse, from August 2003 to December 2004; (2) Beijing Biss International School, Beijing, People's Republic of China, Senior Nurse, November 2000 to August 2003; (3) Beijing Hospital, Beijing, People's Republic of China, Nurse, June 1997 to October 2000. The petitioner submitted a letter and translation issued by the Beijing Hospital of Ministry of Health to document the beneficiary's experience. The Ministry of Health letter provided that the beneficiary was employed with Beijing Hospital from 1987 to 1989 as a Registered Nurse; from 1990 to 1995 as a Registered Nurse; from 1997 to 2000 as a Registered Nurse.

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(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.

On the ETA 750B, the beneficiary listed that she attended the following schools: (1) Beijing Hospital Nursing School, Beijing, China, September 1985 to December 1987. She listed that she received a Bachelor of Science in Nursing diploma; (2) Singapore General Hospital, Singapore, June 1995 to May 1997, where she received a Certificate in Nursing; and (3) Peking Union Medical College, September “1964” [sic] to July 2000, where she received an “advanced diploma” for studies in nursing.

To document the beneficiary’s educational equivalency, the petitioner submitted an educational evaluation. The evaluator reviewed the beneficiary’s certificates issued by Peking Union Medical College, and concluded that the beneficiary had the equivalent of an Associate’s degree in Nursing. Separately, the petitioner submitted copies of the beneficiary’s Diploma for Beijing Secondary Specialized School for studies in Nursing, along with a copy of the beneficiary’s academic record for education completed at Peking Union Medical College. As noted in the director’s denial, the documentation and evaluation submitted were insufficient to document that the beneficiary met the educational requirements of a Bachelor of Science degree in Nursing.

On appeal, the petitioner contends that, “the employer-petitioner’s minimum education requirement for the position of registered nurse [sic] is a U.S. equivalent Associate Degree in nursing . . . the labor certification (ETA 750) states that the minimum education requirement for the position of a registered nurse is a Baccalaureate degree. This information was an error and an inadvertent and honest mistake on the part of the employer-petitioner.” In support, the petitioner submitted a statement signed by the Director of Human Resources providing that the “minimum education requirement of our Company for the position of Registered Nurse is a U.S. equivalent Associate Degree in Nursing.” Further, counsel contends that a Bachelor’s degree is not required for a Schedule A filing.

While the petitioner is correct that a Schedule A petition may not necessarily require a Bachelor’s degree, the petitioner submitted Form ETA 750 requiring a Bachelor’s degree in Nursing. The position was posted, pursuant to applicable posting requirements, and listed that the position required a Bachelor’s degree. Any applicants who viewed or responded to the posting notice would have been required to show a Bachelor’s degree to qualify for the position. The petitioner cannot now alter the position requirements after filing, whether inadvertently listed or not, and subsequently require only an Associate’s degree. To do so would be unfair to any applicants without a Bachelor’s degree who did not apply thinking that they were not qualified. Further, and critically, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, August 4, 2004. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petitioner concedes that the beneficiary does not have a bachelor's degree in nursing, and, therefore, fails to have the education specified on the Form ETA 750. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Accordingly, the petitioner has failed to establish that the beneficiary met the educational requirements of the Form ETA 750, and the petition was properly denied. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.