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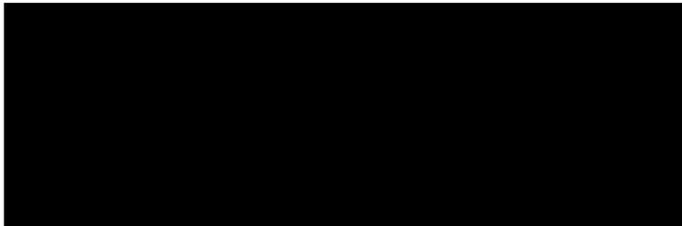
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: OCT 10 2006

WAC 04 046 50265

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:

SELF-REPRESENTED

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 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.¹

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 certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Form ETA 750, Application for Alien Employment Certification, with the Form I-140, Immigrant Petition for Alien Worker. The director determined that the petitioner had not established that the beneficiary qualifies for an occupation listed in Schedule A, Group I. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's March 9, 2005 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Employment-based petitions depend on priority dates. The priority date for Schedule A occupations is established when the Form I-140 is properly filed with Citizenship and Immigration Services (CIS). 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 5, 2003.

The proffered wage as stated on the Form ETA 750 is \$26.00 per hour (\$54,080.00 per year based on a 40 hour work week). On the Form ETA 750B, signed by the beneficiary on November 25, 2003, the beneficiary did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have been established in 1965, to have a gross annual income of \$6,300,000.00, and to currently employ 200 workers.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.² On appeal, the petitioner submits a brief, a copy of the beneficiary's previously submitted registered nurse license issued by the State of California's Board of Registered Nursing valid from December 10, 2004 to September 30, 2008, a copy of the beneficiary's previously submitted interim registered nurse license issued by the State of California's Board of Registered Nursing valid from August 14, 2003 to February 14, 2004, the petitioner's previously submitted amended Form ETA 750A, the beneficiary's previously submitted diploma and

¹ It is noted that an attorney who has resigned his license to practice law in California represents the petitioner. See http://members.calbar.ca.gov/search/member_detail.aspx?x=173758 (accessed October 3, 2006). Therefore, the AAO may not recognize counsel in this proceeding.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

transcripts from ██████████ College in the Philippines indicating that the beneficiary obtained her bachelor of science degree in nursing in April 1993 and a copy of the petitioner's previously submitted letter in support of the petition. Other relevant evidence in the record includes the beneficiary's registered nurse license issued by the Professional Regulation Commission in the Philippines valid from March 4, 1994 to August 10, 2005, and the beneficiary's examination results and certification from the Nurse Licensure Examination given by the Professional Regulation Commission in the Philippines on August 28, 1993. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, the petitioner asserts that the director erred in denying the petition because the beneficiary is a licensed registered nurse in the State of California, and that the petitioner experiences a shortage of nurses and is in great need of the beneficiary's services. The petitioner also asserts that the beneficiary passed the NCLEX-RN examination in California prior to receiving her registered nurse license from the California Board of Registered Nursing.

In order to establish the beneficiary's eligibility under the instant petition, the petitioner must demonstrate that on the filing date of the petition, the beneficiary had the qualifications stated on the Form ETA 750, Application for Alien Employment Certification, which was submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The Form ETA 750 specifies that the position requires a bachelor of science degree in nursing. The petitioner must also demonstrate that as of the priority date, the beneficiary possessed the qualifications imposed by the regulations.

Definitions of skilled workers and of professionals for purposes of immigrant petitions are found in the regulation at 8 C.F.R. § 204.5(l)(3) which 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 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 showing 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 an alien may qualify for Schedule A designation as a nurse if the person has passed the CGFNS examination or if the person holds a full and unrestricted license to practice nursing in the state of intended employment.

Similarly, the regulation on applications for labor certification for Schedule A occupations at 20 C.F.R. § 656.22 (c)(2) states, in pertinent part:

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.

A memorandum dated December 20, 2002 from Thomas Cook, Office of Adjudications, INS (now CIS), added an additional examination as an acceptable criteria for Schedule A certification. The memorandum instructed 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.

In the instant case, the record contains no evidence indicating that as of the priority date of December 5, 2003, the beneficiary had passed the CGFNS examination or the NCLEX-RN examination, and no evidence indicating that the beneficiary held a full and unrestricted license to practice nursing in California as of the priority date.³ Lacking such evidence, the record fails to establish that the beneficiary is qualified for Schedule A designation. See 20 C.F.R. § 656.10(a)(2). 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).

Thus, the evidence submitted does not establish that the beneficiary qualifies for an occupation listed in Schedule A, Group I.

Beyond the decision of the director, the petitioner has not shown that the beneficiary possessed the qualifications listed on Form ETA 750.⁴ The Form ETA 750 states in block 14 that the minimum education for the offered position is a bachelor of science in nursing. The record contains a copy of the beneficiary's diploma showing a degree of Bachelor of Science in Nursing granted on April 3, 1993 by Mary Chiles College, Manila, Philippines, with accompanying course transcripts. The transcripts indicate that the beneficiary's diploma represents four years of full-time study. However, the record lacks an educational evaluation of whether the beneficiary's bachelor's degree is equivalent to a United States bachelor's degree.

The Form ETA 750 provides no criteria by which to evaluate a beneficiary's foreign education for equivalency to a United States bachelor's degree. "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*" 8 C.F.R. § 204.5(1)(3)(C). Any additional proceedings should address this issue.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit

³ While the petitioner asserts that the beneficiary passed the NCLEX-RN examination prior to receiving her registered nurse license from the California Board of Registered Nursing, the petitioner submitted no evidence to establish that the beneficiary passed the examination prior to December 5, 2003. The evidence establishes only that the beneficiary obtained her full and unrestricted registered nurse license in the State of California on December 10, 2004, over one year after the priority date.

⁴ 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*, 229 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 (2d Cir. 1989)(noting that the AAO reviews cases on a de novo basis).

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.