

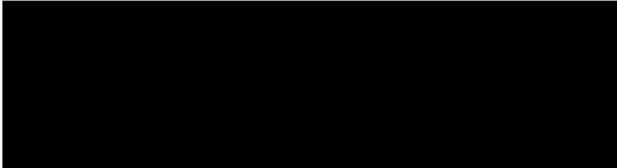


U.S. Citizenship  
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Office: CALIFORNIA SERVICE CENTER

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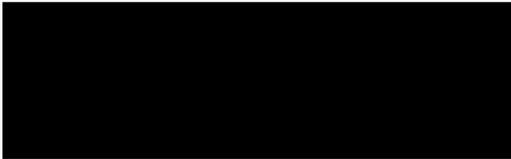
IN RE:

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, 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.

The petitioner is a nursing registry employer. 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, Schedule A, Group I. The director determined that the petitioner had not demonstrated that the beneficiary had passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or holds a full and unrestricted license to practice professional nursing in California, the State of intended employment. Further, the director found that the petitioner had not submitted a certified copy of a letter from the State of intended employment stating that the beneficiary had passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), and, that the beneficiary 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). Therefore, the director denied the petition accordingly.

The petition was accepted for filing on June 25, 2004, that is the priority date, herein. *See* 8 C.F.R. § 204.5(d).

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. This section also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as a professional (registered nurse). Aliens who will be employed as nurses are listed on Schedule A. Schedule A is a list of occupations found at 20 C.F.R. § 656.10. The Director of the United States Employment Service has determined that an insufficient number of United States workers are able, willing, qualified, and available to fill the positions available in those occupations, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

The regulation at 20 C.F.R. § 656.10(a)(2) specifies 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.) (b)(2) states that the Application for Alien Employment Certification form shall include evidence that notice of filing the application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.20(g)(3) of this part.

The regulation at 20 C.F.R. § 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. § 656.22(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 (CGFNS) 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 Citizenship and Immigration Services (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.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA 750 at Part A) in duplicate with the appropriate CIS office. *See* 20 C.F.R. § 656.22(a). The Application for Alien Employment Certification shall include:

1. Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.
2. Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

*See* 20 C.F.R. § 656.22(b).

The regulation at 20 C.F.R. § 656.22(e) states in part:

An Immigration Officer shall determine whether the employer and alien have met the applicable requirements of Sec. 656.20 of this part, of this section, and of Schedule A ...

(2) The Schedule A determination of INS [CIS] shall be conclusive and final. The employer, therefore, may not make use of the review procedures at Sec. 656.26 of this part.

Accompanying the petition, counsel submitted the following documents: a cover letter dated December 31, 2003; a Form 750 A/B for a Schedule A occupation, in this case a registered nurse; a notice of posting of the Application for Alien Employment Certification; and, a letter from the petitioner dated January 24, 2003 as well as the beneficiary's personal and professional documentation.

Reviewing the entire record, the only professional license the beneficiary possesses was issued by the government of the Philippines.

On January 28, 2005, the director, consistent with the regulation at 20 C.F.R. § 656.22(c)(2), requested additional evidence in the matter. The director requested documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination and that she is eligible to be issued a license to practice nursing in that state; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment, that is California, or that the petitioner submit 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 response the petitioner through counsel requested additional time for the beneficiary to pursue her nursing license in California and for the beneficiary to submit her NCLEX-RN passing certificate. Counsel submitted two documents dated October 8, 2004, and February 24, 2005, indicating that the beneficiary was eligible to sit for the NCLEX-RN examination.

On May 16, 2005, the director issued a denial of the petition. The director determined that the petitioner had not demonstrated that the beneficiary had passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or holds a full and unrestricted license to practice professional nursing in California, the State of intended employment. Further the director found that the petitioner had not submitted 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 appeal, Form I-290B, filed June 15, 2005, counsel asserts that the beneficiary was eligible<sup>1</sup> to sit for the NCLEX-RN examination on June 22, 2005, and, that since the beneficiary intends to “pursue [her] license at [the] place of intended employment [California] ...” is eligible to practice nursing in California. Counsel cites as precedent in this matter, *Matter of Maher*, 12 I&N Dec. 680 (R.C. 1968); *Matter of Semerjiar* (R.C. 1966); *Matter of Naufahu*, 11 I&N Dec.904 (R.C. 1996) that are cases concerning a dentist, engineer and lawyer respectively. None of those case are relevant to the issue here, that is compliance with the regulation at 20 C.F.R. § 656.22(c)(2) as aforesaid.

Accompanying the appeal, counsel submitted copies of the following documents: a legal statement; two documents dated October 8, 2004, and February 24, 2005, indicating that the beneficiary was eligible to sit for the NCLEX-RN examination; and, a confirmation of NCLEX Examination Appointment dated May 25, 2005; and, the director’s decision.

Since the communication made on appeal, neither the petitioner nor counsel have not submitted any additional documentation concerning the beneficiary’s eligibility.

As stated, under the regulation, along with the Application for Alien Employment Certification, the petitioner must submit documentation that the alien has passed the Commission on Graduates of Foreign Nursing

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<sup>1</sup> As noted above, demonstrating permission to take the NCLEX-RN examination is not a demonstration of eligibility.

Schools (CGFNS) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment. The petitioner may also submit 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.<sup>2</sup>

Counsel's request that these documents may be submitted sometime in the future is unavailing under the regulation. Eligibility for the benefits sought must be established by the priority date. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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.

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<sup>2</sup> Beyond the decision of the director, the beneficiary's name does not appear under search results for registered nurses, either temporary or permanent licensing, on the website provided by the State of California Department of Consumer Affairs found at <[Http://www2.dcaca.gov/plas/wllpub](http://www2.dcaca.gov/plas/wllpub) ...> accessed January 30, 2007. Further, if this matter is pursued proof should be submitted by the petitioner that the wage proffered is the prevailing wage for the occupation in the area of employment.