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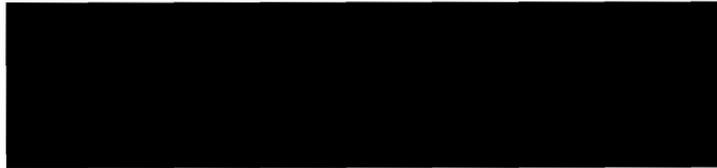
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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FILE: WAC 05 007 52112 Office: CALIFORNIA SERVICE CENTER Date: MAY 30 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:
[Redacted]

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 preference visa petition. The petitioner subsequently submitted a motion to reopen/reconsider which the director dismissed because the petitioner did not state reasons for reconsideration supported by pertinent precedent decisions or that the decision was incorrect based on the evidence of record at the time of the initial decision. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

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 Schedule A, Group I labor certification pursuant to 20 C.F.R. § 656.10(a). The director determined that the petitioner had not established that the beneficiary held a full and unrestricted license to practice nursing in the state of intended employment, namely, California, at the time the petition was filed, that the petitioner did not provide a certified letter from the state of California indicating that the beneficiary was eligible for licensure in California in lieu of the requisite license, or that the beneficiary had passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) examination. Therefore, the director denied the petition.

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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 17, 2005 denial, the single issue in this case is whether or not the beneficiary possesses the requisite licensure to perform the duties of the proffered position at the time the petition was filed.

In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act) as a registered nurse on October 4, 2004. Aliens who will be permanently employed as professional nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.10 for 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. Also, according to 20 C.F.R. § 656.10, aliens who will be permanently employed as professional nurses must have (1) passed the CGFNS examination, or (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment. The Form ETA 750, Part A, submitted with the initial petition states in Section 15, "Must be licensed to practice nursing in the State of California or eligible to sit for licensing exam (NCLEX)."

The AAO takes a *de novo* look at issues raised in the denial of the petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.¹

Relevant evidence in the record includes the following: a copy of the beneficiary's Pass report apparently taken from the NCLEX-RN website dated May 17, 2000,² and a copy of the beneficiary's nursing license from the state

¹ 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).

² This document indicates the beneficiary was an applicant for licensure by the Georgia Board of Nursing

of Georgia with an expiration date of January 31, 2006. Counsel also submitted an excerpt from the Department of Labor (DOL) regulations for Schedule A Applicants,³ as well as a copy of an interoffice memorandum written by Thomas Cook, former Acting Assistant Commissioner, Office of Adjudications, legacy Immigration and Naturalization Service (INS).⁴ The record contains a copy of another CIS interoffice memorandum written by William R. Yates, Associate Director, Operations.⁵ The latter memorandum discusses the adjudication of I-140 petitions for nurses temporarily unable to obtain social security cards, and provides guidance to CIS adjudicators that if all other requirements applicable to the petition are met, the adjudicator can favorably consider the I-140 petition for a foreign nurse, upon presentation of a certified copy of a letter from the state of intended employment that confirms the alien has passed the NCLEX-RN examination and is eligible to be issued a license to practice nursing in the state in question. The record does not contain any other documentation relevant to the issue of whether the beneficiary possesses the requisite licensure to perform the duties of the proffered position in the state of California.

On appeal, counsel states that the beneficiary has an NCLEX-RN pass notice and as such meets the DOL requirement for a Schedule A registered nurse position. Counsel states that both the Cook and Yates memo provide guidance from DOL that states an NCLEX-RN exam pass is sufficient to meet the requirements for a Schedule A Registered Nurse eligibility.

In his response to a request for further evidence, counsel referenced a guidance memorandum from Thomas E. Cook titled "Adjudication of Form I-140 Petitions for Schedule A Nurses," dated December 20, 2002. For further clarification, the AAO will briefly comment on this memorandum. The guidance considered the approval of I-140 petitions when the nurse could not obtain a permanent state nursing license because he or she did not have a social security number. If the petitioner met all requirements for Schedule A classification under the ETA 750, the 2002 memorandum instructed directors of service centers, the AAO, and other CIS officials to consider successful NCLEX-RN results favorably, in lieu of having either passed the CGFNS exam or currently having a license to practice nursing in that state. Since they satisfy § 212(r)(2) of the Act, 8 U.S.C. § 1182(r)(2), *a fortiori*, they fulfill terms of 20 C.F.R. § 656.22 (c)(2) for the alternative of approval of the I-140, based on successful examination results. The guidance memorandum expanded the list of criteria available for proving eligibility at the I-140 stage.

Upon review of the record, the beneficiary, at the time the instant petition was filed on October 4, 2004, did not possess a full and unrestricted nursing license from the state of California, the state of intended employment. Based upon evidence submitted to the record in response to the director's first request for further evidence, however, the beneficiary did possess a nursing license from the state of Georgia which in

when she took the NCLEX-RN exam.

³ The director in his decision referred to this excerpt as regulations at 20 C.F.R. § 656.5(a)(2)(iii), and noted that these DOL regulations were not applicable at the time the petition was filed, namely October 4, 2004.

⁴ Memorandum from Thomas E. Cook, Acting Assistant Commissioner, Office of Adjudications, *Adjudication of Form I-140 Petitions for Schedule-A Nurses Temporarily Unable to Obtain Social Security Cards*, HQ70/6.13, (December 20, 2002).

⁵ Memorandum from William R. Yates, Associate Director, Operations, *Current Processing of Pending Forms I-140 for a Schedule A/Group I or II Occupations Missing Evidence of Compliance with U.S. Department of Labor (DOL) Notification/ Posting Requirements and Guidance Effective March 28, 2005 pursuant tot new DOL regulations at 20 C.F.R. Part 656 Regarding the New Process of Blanket Labor Certification for Schedule A*, HQPRD70/8.5,(September 23, 2005).

turn was based on the beneficiary's passage of the NCLEX-RN based on her examination on May 17, 2000. Thus, while the Schedule A petition and ETA 750 requires licensure in the state of California or eligibility to sit for the NCLEX-RN exam, the record establishes that the beneficiary has already sat for the NCLEX-RN exam prior to receiving her registered nurse license from the state of Georgia, and prior to the filing of the instant petition.⁶

On appeal, counsel states that the guidance provided by CIS interoffice memoranda indicates that the beneficiary's possession of a NCLEX-RN pass notice is sufficient to establish her eligibility as a Schedule A registered nurse. The AAO acknowledges that CIS does accept the beneficiary's NCLEX examination results from May 17, 2000 in lieu of having passed the CFNS exam or having a state of California registered nurse license. The AAO further acknowledges that the guidance provided in the Yates memo with regard to the submission of a certified copy of a letter from the state of intended employment which confirms that the beneficiary has passed the NCLEX-RN examination and is eligible to be issued a license to practice nursing in that state, is simply guidance, and is not mandated by regulation. The evidence provided by the petitioner as to the beneficiary's passage of the NCLEX-RN examination is sufficient to meet the present regulatory criteria. Therefore the director's decision dated September 17, 2005 is withdrawn with regard to the beneficiary's licensure.

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, the petitioner has met that burden.

ORDER: The appeal is sustained.

⁶ It is not clear why the Form ETA 750 would require such eligibility to sit for the NCLEX-RN exam, if, as asserted by counsel, the beneficiary is already eligible to perform the duties of the proffered position, based on her state of Georgia nursing license and prior passage of the NCLEX-RN exam.