U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

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FILE: EAC 02 165 53055 Office: VERMONT SERVICE CENTER Date: JUL 13 2004

IN RE: Petitioner: [redacted]
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:

[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, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. 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 a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140). The director determined that the petitioner had not established that the beneficiary possessed the necessary licensing credentials required by the regulations applicable to the admission of registered nurses under Schedule A, Group I.

On appeal, the petitioner, through counsel, submits additional information and asserts that the petitioner satisfied the applicable requirements for the position offered.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

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.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be "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 which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of Labor's Labor Market Information Pilot Program 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).

The regulations set forth in Title 20 of the Code of Federal Regulations also provide specific guidance relevant to the requirements that an employer must follow in seeking certification under Group I of Schedule A. An employer must file an application for a Schedule A labor certification with CIS. It must include evidence of prearranged employment for the alien beneficiary signified 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] 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.

In this case, the immigrant visa petition was filed on April 18, 2002. The ETA 750-A accompanying the petition establishes that the position of registered nurse pays $20.45 per hour. The director determined that the petitioner initially failed to submit sufficient evidence of its continuing ability to pay the proffered wage and had failed to submit documentation that the beneficiary had either passed the CGFNS examination or that she holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment.

On September 5, 2002, the director instructed the petitioner to provide evidence that the beneficiary has passed the CGFNS examination or that she holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment. The director also requested the petitioner to submit evidence that it has had the continuing ability to pay the proffered wage beginning as of the date of filing.

In response, counsel submitted copies of statutory provisions applicable to immigrant visa applicants, a copy of a letter from the Office of Examinations of the Service, now CIS, dated January 28, 1997, and a copy of a 1996 Department of State cable. Counsel also submitted a copy of an audited consolidated financial statement covering the years ending June 30, 2000 and June 30, 2001, as well as a letter from the petitioner's chief executive officer confirming that the petitioner has approximately 752 full-time equivalent employees and has the ability to pay the beneficiary's proffered wage.

Counsel failed to submit any evidence showing that the beneficiary had passed any licensing examination or that she holds a state nursing license. Rather, counsel concedes that the beneficiary does not yet have the required credentials. Citing prior CIS policy, the Office of Examinations letter and the State Department cable, counsel asserts that a petitioner does not need to submit evidence of the beneficiary's passage of the CGFNS or NCLEX-RN examination, or show state licensure in conjunction with the submission of an I-140 based on an application for Schedule A labor certification.

The director denied the petition, finding that the petitioner had failed to establish that the beneficiary has passed any licensure examinations or holds a full and unrestricted license to practice nursing in the state of intended employment. For the reasons discussed below, the AAO concurs and further notes that the record contains no evidence relating to the posting of the notice of the job opportunity and Application for Alien Employment Certification.

On appeal, counsel again asserts that the Form I-140 is approvable without submission of the required licensure evidence. Counsel maintains that such evidence need not be produced prior to the beneficiary's

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[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 the Service that it may favorably consider an I-140 petition for a foreign nurse for Schedule A labor certification 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).

appearance at a consular office or an adjustment hearing. Counsel states that prior CIS policy has permitted such a practice and asserts that the equity and fairness should dictate the same policy in this case.[2] In support of this claim, counsel resubmits the Office of Examinations letter and Department of State letter previously offered to the director. Counsel also submits a copy of *a* memo from the Office of Adjudications, *Adjudication of Form I-140 Petitions for Schedule-A Nurses Temporarily Unable to Obtain Social Security Cards* (December 20, 2002). *Supra,* n. 1.

The AAO does not find counsel's assertions persuasive. Each petition filed is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In determining eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. §103.2(b)(16(ii). If previous immigrant visa petitions have been erroneously approved under some prior interpretation of the law without regard to the alien's qualifications for a labor certification under the Schedule A, Group I procedures set forth in the applicable regulations, then this does not mandate future approvals. The AAO is not required to approve applications or 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). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. V. Montgomery,* 825 F.2d 1084 1090 (6th Cir. 1987), *cert denied,* 485 U.S. 1008 (1988). It is also noted that the AAO's authority over a service center is similar to that of a court of appeals and a district court. Even if a service center director had previously approved immigrant petitions on behalf of other similarly unqualified beneficiaries, the AAO would not be bound to follow the contradictory decision of a service center. *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).

Counsel's assertions take the applicable statutory and regulatory interpretations out of their context. While the law provides an exclusionary ground applicable in consular processing or an adjustment of status setting, it also clearly permits CIS to review the beneficiary's qualifications in Schedule A application. The applicable regulations expressly require that a petitioner seeking a Schedule A, Group I labor certification for a professional nurse files the application for Schedule A certification with the I-140. The Schedule A application must be filed with evidence that the alien has passed the pertinent CGFNS examination or holds a state nursing license. 20 C.F.R. § 656.22(c)(2). The 1997 Service letter provided by counsel focuses on grounds of exclusion and does not supercede pertinent regulations or subsequent guidance specific to I-140 adjudication issued by the Office of Adjudications, which expanded the list of criteria available to allow CIS officials to favorably consider successful NCLEX-RN examination results.

As stated above, counsel references the 2002 guidance memorandum from Thomas E. Cook. This memorandum considered the approval of Form I-140 petitions when the nurse could not obtain a social security number or a permanent nursing license of a state. If the petitioner met all requirements for Schedule A classification under the ETA 750, the 2002 memorandum instructs directors of service centers, the AAO and other CIS officials to

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[2] Counsel also raises an estoppel claim but states that it is an issue for another forum. The AAO has no authority to address an equitable estoppel claim. The AAO, like the Board of Immigration Appeals, has no authority to apply the doctrine of equitable estoppel so as to preclude a component part of CIS from performing a lawful action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente,* 20 I&N Dec. 335, 338 (BIA 1991). The AAO's jurisdiction is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). AAO's jurisdiction is also limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003).

consider successful NCLEX-RN results favorably. Since they satisfy section 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 Form I-140, based on successful examination results. This guidance memorandum did not suddenly add the NCLEX examination result to the adjudication process.[3] Rather, the guidance memorandum expanded the list of criteria available for proving eligibility at the I-140 stage. Thus, there was no change such as counsel suggested – that no proof at all was required prior to this memorandum; instead, the items available to proving a beneficiary's qualifications under Schedule A was expanded.

This record does not contain evidence that the beneficiary has passed either the CGFNS or NCLEX-RN examination, or holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment. Therefore, the petition cannot be approved. 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).

In view of the foregoing, the AAO cannot conclude that the director erred in finding that the petitioner has failed to establish that the beneficiary possesses the requisite credentials at the time of filing the visa petition.

It is further noted, that although the director's decision did not discuss the lack of evidence of a proper posting of the job notice in accordance with the provisions 20 C.F.R. 656.20(g), the petition must also be denied on this basis. The evidence in the record failed to establish that the labor certification application was submitted with evidence that the notice of filing of the job opportunity and Application for Alien Employment Certification had been properly offered to the bargaining representative or posted in a conspicuous place at the facility or location of the employment. 20 C.F.R. § 656.20(g)(1)(i) and (ii).

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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[3] The use of the word "admitted" on page two is not persuasive. That word is not used on page one of the memorandum when discussing past Form I-140 adjudication.