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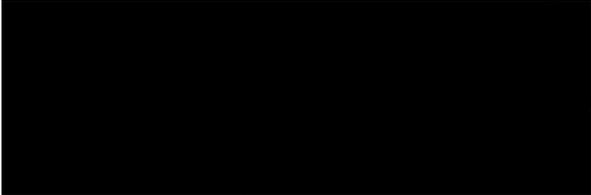
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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**

BP



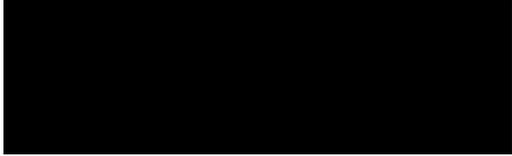
JUL 21 2004
Date:

FILE: EAC 03 146 51334 Office: VERMONT SERVICE CENTER

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.

RPW
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 skilled worker or professional. 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, 8 U.S.C. § 203(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.

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 at Title 20 of the Code of Federal Regulations also provide specific guidance relevant to the requirements than 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

In this case the immigrant visa petition was filed on April 10, 2003. The ETA 750-A accompanying the petition establishes that the position of registered nurse pays \$24.79 per hour. The petitioner initially submitted copies of the beneficiary's college transcripts, foreign bachelor's degree, and a nursing license showing that she is a registered nurse in the Philippines.

On May 20, 2003, the director instructed the petitioner to submit evidence showing that it had properly posted the job offer at the location of employment or had provided a copy of position offered to the bargaining representative of the employees. The director also requested the petitioner to provide evidence of its ability to pay the proffered wage. Finally, the director instructed the petitioner to submit evidence that the beneficiary possesses the appropriate licensing credentials. The director advised the petitioner that it should provide evidence that the beneficiary had passed the CGFNS Examination, that she holds a full and unrestricted permanent license to practice nursing in the state of intended employment, or that a letter from the state of intended employment is submitted to show that she has passed the NCLEX-RN and is eligible to be licensed in that state.

In response, counsel submitted evidence establishing the petitioner's ability to pay the proffered wage, a copy of a posting of a registered nurse position, copies of statutory provisions applicable to immigrant visa applicants, and a copy of a letter from the Office of Examinations of the Service, now CIS, dated January 28, 1997. Counsel also submitted a copy of a Department of State cable, dated December 1996. 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 a Schedule A labor certification.

The director denied the petition, determining that the petitioner had failed to provide evidence that the beneficiary has passed any licensure examination or holds a full and unrestricted license to practice nursing in the state of intended employment.

On appeal, counsel again asserts that the 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 appearance at a consular office or an adjustment hearing. Counsel states that prior CIS policy has permitted such practice. In support of this claim, counsel resubmits the Office of Examinations letter and Department of State cable previously offered to the director. Counsel also submits a copy of the December 20, 2002, Memo from Thomas Cook. *See, supra* at n. 1.

Counsel's assertions are not persuasive. The December 2002 guidance memorandum from Thomas Cook

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).

considered approvals of Form I-140 petitions when a 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 consider successful NCLEX-RN examination results favorably. Since they satisfy section 212(r)(2) of the Act, 8 U.S.C. § 1182(r)(2), *a fortiori*, they fulfill the terms of 20 C.F.R. § 656.22(c)(2) for the alternative of approval of the I-140, based on successful examination results. This guidance memorandum did not suddenly add the NCLEX-RN examination result to the adjudication process.² Rather, the memorandum expanded the list of criteria available for proving eligibility at the I-140 stage. Thus, there was no change such as counsel suggests—that no proof at all was required prior to this memorandum; instead, it increased the number of items available to prove a beneficiary's qualifications under Schedule A.

Even 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, 596 (Comm. 1988). CIS, or any other agency, has no obligation to 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 must be emphasized that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The claim that the petitioner relied on past approvals of petitions that lacked evidence of a beneficiary's qualifications, to invest further time and money in filing for subsequent petitions, cannot be considered as a basis to apply an estoppel argument. The AAO, like the Board of Immigration Appeals, has no authority to apply a doctrine of equitable estoppel so as to preclude a part of CIS to undertake a lawful course of action that it is authorized to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). The AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003) and by the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003).

It is further noted, that even if counsel's interpretation of a 1997 Office of Examinations letter accurately described its position, it does not supercede applicable law and is not binding on the AAO.³ While the law provides an exclusionary ground applicable in a consular processing or adjustment of status context, it also clearly permits CIS to determine the beneficiary's qualifications in a Schedule A, Group I application for a blanket labor certification. The record reflects that no state nursing license or successful CGFNS examination results were obtained by the beneficiary as of the visa priority date. The petitioner also failed to provide any evidence that the beneficiary had passed the NCLEX-RN examination as an alternative. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner applies for labor certification for a Schedule A occupation directly to CIS, and the Department of Labor does not review them. Thus, the regulations authorize

² The use of the word "admitted" on page two is not persuasive. On page two of the memorandum the word is not used when discussing past I-140 adjudications.

³ *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

CIS to determine the petitioner's compliance. See C.F.R. §§ 656.22(a) and (e), § 656.20(c), and 8 C.F.R. §§ 204.5(a)(2).

The record in the instant case does not contain any evidence that the beneficiary possesses a full and unrestricted license to practice nursing in the state of intended employment or has successfully passed the CGFNS or NCLEX-RN examination. The petition must be denied.

Beyond the decision of the director, it is noted that the evidence contained in the record relating to the posting of the job offered of registered nurse raises a question as to whether it actually represented the job offered. The evidence offered by counsel consists of a document entitled "Posting." It describes a registered nurse position at the wage of \$25.23 per hour, which is not consistent with the wage set forth in the petitioner's application for Schedule A certification. Further, there is no first-hand evidence from the petitioner that the applicable posting was accomplished for ten consecutive days prior to the visa priority date. Rather it just has a notation at the bottom of the document that it was to be posted on March 24, 2003. Counsel's assurances that the posting occurred cannot constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

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.