



U.S. Citizenship  
and Immigration  
Services

B4



FILE: EAC 02 217 51328 Office: VERMONT SERVICE CENTER

Date: OCT 04 2004

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, Director  
Administrative Appeals Office

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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**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.

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 registered nurse. Aliens who will be employed as professional nurses are listed on Schedule A. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.10 with respect to 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.

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.<sup>1</sup> 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 June 13, 2002. The ETA 750-A accompanying the petition establishes that the position of registered nurse pays \$20.65 per hour. The petitioner initially failed to submit sufficient evidence that the beneficiary had either passed the CGFNS examination or that he holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment. The director also initially determined that the petitioner had failed to submit sufficient evidence that it had properly provided a notice of filing Form ETA-750, to the bargaining representative or had posted the job opportunity at the employment facility or location of the employment.

On December 11, 2002, the director instructed the petitioner to provide evidence that the beneficiary has passed the CGFNS examination or that he 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 had notified the bargaining representative or, if no bargaining representative, had properly posted the notice of filing the ETA 750 in a conspicuous place at the location of employment.

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 failed to submit any evidence with his response showing that the beneficiary had passed any licensing examination or that he holds a state nursing license. Rather, counsel concedes in his transmittal letter, 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 NCLEX-RN or CGFNS examination, or show state licensure in conjunction with the submission of an I-140 based on an application for Schedule A labor certification.

With his response, counsel also submitted a copy of an undated job posting describing nineteen openings for registered nurses at the stated rate of pay set forth in the petitioner's Form ETA-750A contained in the record.

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<sup>1</sup> 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).

Counsel claims in his transmittal letter that there is no union for the position being posted and that the petitioner posted the job opening on its bulletin board from May 24, 2002 until July 19, 2002.

The director denied the petition, finding that the petitioner had failed to establish that the beneficiary has passed any U.S. licensure examinations or holds a full and unrestricted license to practice nursing in the state of intended employment.

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 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.<sup>2</sup> 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 (6<sup>th</sup> 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 (5<sup>th</sup> 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

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<sup>2</sup> 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).

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 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 petition otherwise meets 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 results favorably. Since alien beneficiaries possessing successful NCLEX-RN results would 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 result to the adjudication process.<sup>3</sup> 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 NCLEX-RN or CFGNS 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.

Beyond the decision of the director, the AAO finds that no first hand evidence of the dates of posting the position opening and whether there is a bargaining representative at the location of employment has been corroborated by the petitioner. The assertions of counsel in this matter cannot constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). Evidence of such posting should be substantiated by the petitioner establishing that an attempt to provide notice to any interested U.S. applicant has been completed.

It is further noted that the record contains no evidence of the petitioner's ability to pay the proffered wage pursuant to the requirements of 8 C.F.R. § 204.5(g)(2), which requires a petitioner to establish a continuing ability to pay the proffered wage as of the visa priority date and continuing until the beneficiary obtains lawful resident status. For these additional reasons, the petition may not be approved.

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>3</sup> 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.