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U.S. Citizenship
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FILE: EAC 03 018 54651 Office: VERMONT SERVICE CENTER Date: APR 14 2005

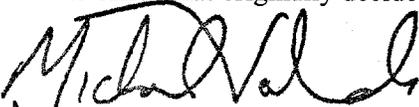
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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)



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 preference 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 is a hospital. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts the beneficiary qualifies for 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).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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.

Eligibility in this matter hinges on the qualifications of the beneficiary for the position at the priority date. Employment-based petitions depend on priority dates. The priority date for Schedule-A occupations is established when the Form I-140 is properly filed with Citizenship and Immigration Services (CIS), formerly the Service or the INS). 8 C.F.R. § 204.5(d). The petition must be accompanied by the documents required by the particular section of the regulations under which it is submitted. 8 C.F.R. § 103.2(b)(1). The priority date of the petition in this case is October 17, 2002.

The petitioner initially submitted insufficient evidence of the beneficiary's qualifications for the position. In a request for evidence dated March 10, 2003 (RFE), the director required a full and unrestricted license to practice professional nursing in the State of intended employment or the certificate that the beneficiary had passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) examination. See 20 C.F.R. § 656.10, Schedule A, Group I.

In response, counsel provided copies of:

- The December 20, 2002 AAO memorandum to service centers directing how to adjudicate Form I-140 petitions for Schedule-A nurses who cannot obtain a Social Security card;
- Section 212(a)(5)(C) of the Act, providing for consular exclusion of registered nurse aliens who cannot show they have passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination;
- The regulation 8 C.F.R. 204.5 on the supporting documents required when filing a Form I-140 petition for Schedule-A nurses;
- The January 28, 1997 AAO memorandum directing service centers not to exclude health-care workers under § 212(a)(5)(C) of the Act;
- The State Department's December 1996 cable with consular instructions to include health-cared workers who have not passed the CGFNS examination;
- A letter¹ from the petitioner's chief financial officer asserting that the petitioner has more than 100 employees to avoid the usual ability-to-pay requirements required under 203(b)(3)(A)(i) of the Act; and

¹ This office notes that the letter was apparently sent almost six months after the petition's priority date.

- An April 11, 2003² letter from the petitioner giving notice of the petition's filing to a representative of the bargaining unit "for the 13 registered nurses that are being sponsored for permanent residency."

The director determined that the petitioner's evidence did not show that the beneficiary either passed the CGFNS examination or had a full and unrestricted license from the from the state of intended employment, or instead that the beneficiary had not then passed the National Council Licensure Examination for registered nurses (NCLEX-RN). The Director concluded that the beneficiary did not qualify for certification under Schedule A and denied the petition.

Counsel, on appeal, states:

- The CIS has – unfairly and without due notice – changed its six-year policy of not requiring Schedule-A nurses who plan to gain entry through consular processing;
- The policy change could cost the petitioner more than \$150,000 in what it has so far invested in multiple candidates for nursing positions with the petitioner;
- Because the filing date preceded the AAO's December 20, 2002 memo, the AAO should refrain from enforcing it against the petitioner.

Counsel's assertions regarding the meaning of the various AAO memos is at variance with this office's reading of the salient parts of the memos.

In the instant case, counsel's statements pertaining to the CGFNS certificates refer to certificates issued pursuant to INA § 212(a)(5)(C), as discussed above. Counsel asserts that by requiring evidence of passing the CGFNS examination as part of the I-140 adjudication, the director improperly adjudicated the beneficiary's excludability under INA § 212(a)(5)(C).

Counsel's statements fail to distinguish between a CGFNS certificate and the CGFNS examination. Passing the CGFNS examination does not guarantee that a CGFNS certificate will be issued, since the CGFNS examination is only one of several elements that are required for the issuance of a CGFNS certificate. *See* INA § 212(a)(5)(C).

Notwithstanding counsel's assertions, the applicable Department of Labor regulations do not require an adjudication of the beneficiary's excludability as part of the evaluation of whether the beneficiary qualifies for Schedule A designation as a nurse. The regulation at 20 C.F.R. § 656.22 (c)(2) does not require evidence that the beneficiary holds a CGFNS certificate, but only evidence that the alien "has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination," or evidence that the alien holds a nursing license in the state of intended employment at the time of the filing of the application for labor certification.

In addition to the criteria specified in the regulations at 20 C.F.R. §§ 656.10(a)(2) and 656.22(c)(2), the memorandum dated December 20, 2002, from Thomas Cook of the Office of Adjudications has added an additional examination, the National Council Licensure Examination for Registered Nurses (NCLEX-RN), as an acceptable criteria to evaluate whether the beneficiary qualifies for Schedule A designation.

In the instant case, the record contains no evidence indicating that the beneficiary has passed the CGFNS examination or the NCLEX-RN examination, and no evidence indicating that the beneficiary holds a license to practice nursing in Pennsylvania. Lacking such evidence, the record fails to establish that the beneficiary is qualified for Schedule A designation. *See* 20 C.F.R. § 656.10(a)(2). A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing. A petition cannot be approved at a

² Again, this office notes that the letter is dated almost six months after the petition's priority date.

future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel asserts in his brief that the Vermont Service Center has in the past approved I-140 petitions for nurses without requiring evidence that the beneficiary has passed the CGFNS examination or evidence that the beneficiary holds a license to practice nursing in the state of intended employment. Counsel asserts that the memorandum of December 20, 2002 from the Office of Adjudications changed CIS policy with regard to such evidence and that such a change may not be made without notice to the public. As evidence of the prior policy, counsel submits a copy of a memorandum dated January 28, 1997 from the Office of Examinations of the Immigration and Naturalization Service and a copy of a cable dated December 1996 from the Department of State. Each of those documents discusses the implementation of the statutory requirement for intending health care workers of obtaining a CGFNS certificate, a requirement that had been recently added to the INA when those documents were prepared. The January 28, 1997 memorandum from the Office of Examinations instructs field offices adjudicating I-140 petitions not to consider the newly added ground of exclusion as part of an I-140 adjudication. The December 1996 Department of State cable makes no reference to the adjudication of I-140 petitions.

The AAO does not find counsel's assertions regarding past practices in the Vermont Service Center to be 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, that fact would 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). Neither CIS nor any other agency is required 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 is also noted that the AAO's authority over a service center is similar to that of a court of appeals' authority over 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*, 534 U.S. 819 (2001).

To the extent that the January 28, 1997 memorandum from the Office of Examinations is inconsistent with the December 20, 2002 memorandum from Thomas Cook of the Office of Adjudications, the 2002 memorandum supersedes the 1997 memorandum. Moreover, the Department of Labor regulations quoted above give the public adequate notice of the standards for Schedule A designation.

Counsel asserts that the petitioner has incurred substantial costs in reliance on the previous policy of the Vermont Service Center. Even if the AAO were to assume that counsel's assertions on those matters are true, the AAO would have no authority to consider claims based on the petitioner's reliance on a previous policy. The AAO's jurisdiction is limited to the 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). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv).

The petition was not accompanied by evidence that the beneficiary qualified for classification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I, as of the priority date of the petition. As the petitioner has not complied with the instructions stipulated in the Department of Labor regulations, at the time of the filing of the petition, the petition may not be approved.

Beyond the decision of the director, the petitioner failed to submit all the documents the regulations require at the time of filing the petition. Thus, employers filing a labor certification application under 20 C.F.R. § 656.22 for Schedule A registered nurses shall document that notice of the filing of the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees. Here, the petitioner's letter to the bargaining representative was sent after the petition filing date.

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.