

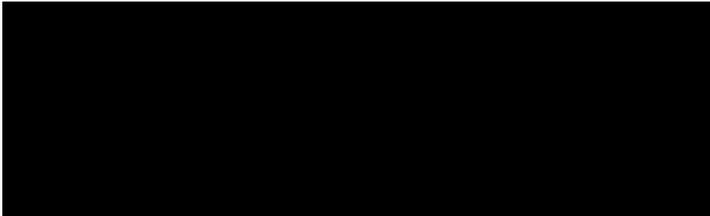
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U.S. Department of Homeland Security
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**U.S. Citizenship
and Immigration
Services**

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BC

FILE: EAC 02 241 54764 Office: VERMONT SERVICE CENTER Date: MAR 25 2005

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.

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 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 denied the petition after determining that the beneficiary was not qualified for the position as there was no evidence of a CFGNS certificate, unrestricted state license to practice nursing, or letter from the state of intended employment confirming passage of the NCLEX-RN examination showing eligibility to issue a license to practice nursing in the state, issued to the beneficiary. The director also denied the petition after determining that the petitioner had not provided evidence that the notice of filing was provided to the bargaining representative or posted according to the regulations at 20 C.F.R. § 626.20(g)(3).

On appeal, counsel submits a brief and copies of evidence formerly submitted into the record of proceeding. Counsel states, in part, that the beneficiary does not need to produce proof of a CFGNS certificate, state license, or verification of passing the NCLEX-RN examination because Citizenship and Immigration Services (CIS) and its predecessor service approved other cases without them at the visa petition stage and only required proof of the beneficiaries' qualifications at consular processing as lawful permanent residents prior to entering the United States. Additionally, counsel states that because of these past approvals and current denials, CIS must be changing its policy without providing notice to the public.

Section 203(b)(3) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1153(b)(3), 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 or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. This section also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 Act as a registered nurse on July 12, 2002. 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 Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, or (2) hold a full and unrestricted license to practice professional nursing in the state of intended employment.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA-750 at Part A) in duplicate with the appropriate CIS office. Pursuant to 20 C.F.R. § 656.22, the Application for Alien Employment Certification shall include:

1. Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.
2. Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

With the initial petition, the petitioner provided copies of the beneficiary's bachelor of science in nursing degree, academic transcripts, and license to practice in the Philippines. Because the evidence was insufficient to adjudicate the petition, the director issued a request for evidence on January 3, 2003 requesting the petitioner's posting notice pursuant to 20 C.F.R. § 656.20(g)(1), and proof of the beneficiary's passage of the CGFNS examination or an unrestricted license to practice nursing in the state of intended employment pursuant to 20 C.F.R. § 656.10. In response, counsel submitted a copy of section 212(a)(5)(C) of the Immigration and Nationality Act; a copy of section 204.5 of Title 8 of the Code of Federal Regulations; a copy of a memorandum from the Office of Examinations of the Immigration and Naturalization Service, dated January 28, 1997; a copy of a cable dated December 1996 from the Department of State; and an undated posting notice. Counsel stated:

[The b]eneficiary does not yet have these requirements. However, despite not having them, [the] beneficiary remains qualified for issuance of an approval of the application for an approved I-140.

The reason is that the [Immigration & Nationality Act] and [CIS] regulations do not require that the beneficiary present CGFNS, the visa screen, TWE, TSE, or TOEFL prior to an appearance at either the Consulate where the beneficiary is being interviewed for issuance of an immigrant visa, or at [a CIS] office during an adjustment interview.

Counsel references sections 212(a)(5)(C) of the Act and 8 C.F.R. § 204.5 for the proposition that submitting proof of the beneficiary's CGFNS certificate or license is only a ground of inadmissibility during consular processing or adjustment of status and not a requirement at the I-140 stage. Counsel also references a CIS memorandum dated January 28, 1997 from the Office of Examination as well as a cable of instructions issued by the Secretary of State in December 1996.

The director denied the petition on June 6, 2003 for failure to produce proof that the beneficiary passed the CGFNS examination or had an unrestricted license to practice nursing. The director also denied the petition after determining that the petitioner had not provided evidence that the notice of filing was provided to the bargaining representative or posted according to the regulations at 20 C.F.R. § 626.20(g)(3). Counsel, on appeal, reiterates his arguments in response to the director's request for evidence. He also quotes from a memorandum issued by CIS, dated December 20, 2002, and signed by [REDACTED] Acting Assistant Commissioner, Office of Adjudications, as further evidence that "[CIS] and the Center Director was routinely approving I-140 petitions for registered nurses, based on [prior] memorandums and policy formation. . . This change came totally without notice to the public, and after [the] petitioner had already relied on this policy and submitted the Form I-140 to [CIS] for adjudication."

One of the first issues raised by counsel is an estoppel argument. Counsel asserts that the petitioner relied upon past approvals of petitions that lacked evidence of the beneficiary's qualifications and invested time and money in its current cases. Thus, although counsel asserts that whether or not estoppel in this case should be applied is a question for another forum, he asserts that equity favors the petitioner. The AAO, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of CIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the AAO is limited to that 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); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of 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). Accordingly, the AAO has no authority to address the petitioner's equitable estoppel claim.

Counsel's assertion that CIS must approve cases in error because cases were approved in the past lacks documentary evidence and precedential support. The record of proceeding does not contain copies of the visa petitions that counsel claims were previously approved. 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).

Counsel's arguments misconstrue statutory and regulatory interpretation from its intended context. There has been no abrupt change in CIS policy. While the law provides an inadmissibility ground applicable in a consular processing or adjustment of status scenario, it also clearly sanctions CIS to ascertain the beneficiary's qualifications in the Schedule A context during the I-140 stage. Counsel quotes letters during the context of temporary regulatory change and a cable from a different administrative agency – neither of which constitutes established policy.

The record reflected no license or CGFNS examination results at the priority date. 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 statute relates eligibility for the immigrant visa to the status of the labor certification at the date of the I-140 petition for classification, the priority date. *See* 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C). Department of Labor regulations limit the

petitioner's alternatives for Schedule A under the ETA 750 to the beneficiary's state license or successful CGFNS examination results. See 20 C.F.R. § 656.22 (c)(2). The petitioner applies for labor certifications for a Schedule A occupations directly to CIS, and the Department of Labor does not review them. Hence, regulations authorize CIS officers to determine the petitioner's compliance. See 20 C.F.R. §§ 656.22(a) and (e), § 656.20(c), and 8 C.F.R. §§ 204.5(a)(2), (d), and (g)(1).

There is also no evidence in the record of proceeding pertaining to the beneficiary's passage of the NCLEX-RN examination. Counsel references a guidance memorandum from Thomas E. Cook titled "Adjudication of Form I-140 Petitions for Schedule A Nurses" etc. (2002 memorandum), dated December 20, 2002. It considered the approval of 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 instructed directors of service centers and AAO and other CIS officials to consider successful NCLEX-RN results favorably. 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. This guidance memorandum did not suddenly add the NCLEX examination result to the adjudication process. 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.

Eligibility for a Schedule A immigrant visa based on the nursing profession requires proof of successful completion of the CGFNS examination, an unrestricted license to practice nursing in the state of intended employment, or a letter indicating successful NCLEX results. The record of proceeding does not contain any of the required evidence in the instant matter for the beneficiary and thus the petition must be denied.

Furthermore, the record does not contain evidence that the petitioner fully complied with regulatory requirements governing the posting notice.

Under 20 C.F.R. § 656.20, the regulations require the following:

In applications filed under 656.21 (Basic Process), 656.21a (Special Handling) and 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:

- (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment.
- (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice shall be posted for at least 10 consecutive days. The notice shall be clearly visible and unobstructed while posted and shall be posted in conspicuous places, where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include, but are not limited to, locations in the immediate vicinity of the wage and hour notices

required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

Upon submission of the posting notice on appeal, counsel states the following:

In response to a request made for a copy of the posting made prior to the submission of filing the I-140 in this case, made in an NOA from the VSC on January 03, 2003, the petitioner was contacted. Petitioner provided a copy of the posting, which was posted on the bulletin board used to give notices to the employees in the facility. This posting was made in response to the NOA, and went up on the bulletin board on January 10, 2003, and was kept there for a period of more than ten (10) days, until February 3, 2003.

However, an earlier posting of the same notice had been placed on the bulletin board prior to the posting sent to the VSC on March 18, 2003. This posting, which has been attached as **Exhibit 5**, is the same notice that was sent to the VSC in response to the NOA. The posting, **Exhibit 5**, was first posted on the bulleting board used by petitioner to give notices to employees on June 17, 2002 and not removed until July 22, 2002.

(Emphasis in original). It is noted that even on appeal, the notice of posting is still undated. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8).

Beyond the decision of the director, it is noted that the petitioner has not provided evidence of its continuing ability to pay the proffered wage from the priority date.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the date the completed, signed petition (including all initial evidence and the correct fee) is

properly filed with CIS. *See* 8 C.F.R. § 204.5(d). Here, the petition was filed on July 12, 2002. The proffered salary as stated on the labor certification is \$20.65 per hour or \$42,952 per year.

As no evidence of the petitioner's ability to pay the proffered wage was submitted,¹ the petition must also be denied.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

¹ It is noted that the director failed to request this evidence.