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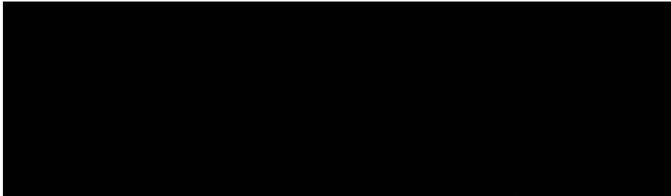
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **MAR 25 2008**
WAC 05 070 52004

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.¹

The petitioner is a staffing service (i.e. a nursing registry). It seeks to employ the beneficiary² permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted a Form ETA 750, Application for Alien Employment Certification, with the Form I-140 Immigrant Petition for Alien Worker. The director determined, *inter alia*, that the evidence submitted does not demonstrate that the beneficiary met the job qualifications on the date of the petition and denied the petition accordingly. Specifically the director found that the evidence submitted did not demonstrate that the beneficiary had passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) examination prior to the priority date of the petition filed for preference classification in the occupation of registered nurse, and, the beneficiary had not met the minimum requirements at the time that the request for certification was filed.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, the appeal meets the requirements of a motion to reconsider as substitute counsel contends and submits evidence that the decision was incorrect based on the evidence of record at the time of the initial decision.

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 has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3) of the Act as a registered nurse. Aliens who will be employed as registered nurses are listed on Schedule A. Schedule A is a list of occupations found at 20 C.F.R. § 656.2(c)(2). The Director of the United States Employment Service has determined that an insufficient number of United States workers are able, willing,

¹ The chronology of this case is as follows: the I-140 petition with a Schedule A Application for Alien Employment Certification Form ETA 750 was filed on December 30, 2004; the director issued a request for evidence (RFE) in the matter on October 18, 2005; a response to the RFE was made by the petitioner on November 14, 2005; the director denied the petition on December 12, 2005; the petitioner appealed the director's decision to the AAO on January 5, 2006; the AAO affirmed the director's decision on July 21, 2006 and it dismissed the appeal; and the petitioner filed a motion to reconsider the AAO's decision of July 21, 2006.

² The beneficiary is also known as

qualified, and available to fill the positions available in those occupations, 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 20 C.F.R. § 656.22(c)(2) states:

An employer seeking a Schedule A labor certification as a professional nurse (§ 656. 22(c)(2) of this part) shall file, as part of its labor certification application, documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment.

In a memo dated December 20, 2002, the Office of Adjudications of Citizenship and Immigration Services (CIS) issued a memo instructing Service Centers to accept a certified copy of a letter from the state of intended employment stating that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) and is eligible to receive a license to practice nursing in that state in lieu of either having passed the CGFNS examination or currently having a license to practice nursing in that state.

In this case, the Form I-140 petition was filed on December 30, 2004. Given that the instant matter was accompanied by an application for Schedule A designation, the priority date for this petition is the date the ETA Form 750 was filed with CIS, or December 30, 2004. *See* 8 C.F.R. § 204.5(d).³

Accompanying the petition were, *inter alia*, the following documents: a labor certification application (U.S. Department of Labor Form ETA 750 A/B); a cover letter from prior counsel dated December 27, 2004; a support letter from the petitioner dated December 22, 2004;⁴ an employment offer letter from the petitioner to the beneficiary dated December 22, 2004; the beneficiary's Republic of the Philippines registered nurse's license; a statement of the beneficiary's TOEFL (i.e. Test of English as a Foreign Language) Scale Scores for a test taken on April 21, 2004; an undated copy of a letter from the Commission on Graduates of Foreign Nursing Schools (CGFNS), Philadelphia, Pennsylvania, to the beneficiary in the Republic of the Philippines providing the beneficiary a CGFNS/ICHP (i.e. International Commission on Healthcare Professions (ICHP)) identification number;⁵ a printed copy of a web page from the Internet site <<https://www.cgfns.org>> dated

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* * *

.... 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 within 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 the Service

Id.

⁴ In that letter dated December 22, 2004, according to Harold Sterling, chief executive officer of the petitioner, the beneficiary possessed on that date a Bachelor's of Science degree in nursing, a Republic of the Philippines registered nurse's license and a Commission on Graduates of Foreign Nursing Schools (CGFNS) certificate.

⁵ A caveat in bold font (not reproduced here) midway through the information transmittal stated: "Please note: Receiving a CGFNS/ICHP ID# does not indicate that you are registered to the CGFNS Qualifying Exam, nor

December 20, 2004, from CGFNS indicating that someone not identified on the copy passed the "Certification Exam" and that the "Issued Certificate" status is "Waiting for Approval;"⁶ as well as documentation concerning the petitioner's ability to pay the proffered wage and the beneficiary's Republic of the Philippines professional education and licensure in that country.

The director issued a request for evidence to the petitioner on October 18, 2005.

In response to the above, by letter dated November 14, 2005, the counsel submitted, *inter alia*, the following relevant evidence to the issue of the beneficiary's qualifications: a cover letter from prior counsel dated November 14, 2005; certificate number [REDACTED] from The International Commission on Healthcare Professions, a division of CGFNS as issued June 24, 2005, to the beneficiary in the profession of a registered nurse; a contract of employment dated November 5, 2005, between the petitioner and the beneficiary; a nursing and related services contact between Memorial Health Services, COMFORCE Technical Services and the petitioner dated August 1, 2005; and the petitioner's Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for 2004 and the first two quarters of 2005.

A certificate from The International Commission on Healthcare Professions, a division of CGFNS was issued June 24, 2005, to the beneficiary that she had met all the requirements of section 212(a)(5)(C) of the Act according to the regulation at 8 C.F.R. § 212.15 (f).⁷

is it a test permit."

⁶ Regarding the above, there is no applicant/test subject/candidate/recipient name on the above printed copy. It does not on its face relate to the beneficiary. We did not find a CGFNS certificate accompanying the petition for the beneficiary as indicated in [REDACTED]'s letter dated December 22, 2004. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

⁷ The regulation at 8 C.F.R. § 212.15 (f) states:

(f) Requirements for issuance of health care certification. (1) Prior to issuing a certification to an alien, the organization must verify the following:

(i) That the alien's education, training, license, and experience are comparable with that required for an American health care worker of the same type;

(ii) That the alien's education, training, license, and experience are authentic and, in the case of a license, unencumbered;

(iii) That the alien's education, training, license, and experience meet all applicable statutory and regulatory requirements for admission into the United States. This verification is not binding on the DHS; and

(iv) Either that the alien has passed a test predicting success on the occupation's licensing or certification examination, provided such a test is recognized by a majority of states licensing the occupation for which the certification is issued, or that the alien has passed the occupation's licensing or certification examination.

(2) A certificate issued under section 212(a)(5)(C) of the Act must contain the following:

The director denied the petition on December 12, 2005. The director determined that the evidence submitted did not demonstrate that the beneficiary met the job qualifications on the priority date of the petition. Specifically the director found that the evidence submitted did not demonstrate that the beneficiary had passed the CGFNS examination prior to the priority date of the petition filed for preference classification in the occupation of registered nurse, and, therefore the beneficiary had not met the minimum occupational requirements at the time that the request for certification was filed.

The petitioner appealed the director's decision to the AAO on January 5, 2006.

Prior counsel submitted a legal brief. Counsel contended on appeal that the director's decision should have been "rescinded" because the beneficiary passed the CGFNS examination prior to the priority date.

As evidence counsel re-submitted a printed copy of a web page from the Internet site <<https://www.cgfns.org>> dated December 20, 2004, from CGFNS indicating that an unnamed individual passed the "Certification Exam" and that the "Issued Certificate" status is "Waiting for Approval." The website print-out does not indicate that it pertains to the beneficiary. Despite the passage of time since the petition was filed and the director's decision was issued, prior counsel had not obtained and submitted to CIS evidence to support the statement of Harold Sterling, chief executive officer of the petitioner, that the beneficiary possessed on December 22, 2004, a CGFNS certificate as a registered nurse.

The AAO's decision dated July 21, 2006, affirmed the director's decision and dismissed the appeal.

Substitute counsel filed a motion to reopen on August 21, 2006. Counsel contends that the decision was incorrect based on the evidence of record at the time of the initial decision. Counsel submits two CGFNS certificates, both bearing the beneficiary's name, and CGFNS identification number. The first certificate (hereinafter the "CGFNS Certificate") states in summary that the beneficiary has "fulfilled the necessary requirements for the CGFNS Certification Program," completed the CGFNS Qualifying Exam and an approved English language proficiency examination. It states "[the beneficiary] is hereby awarded the CGFNS Certificate issued December 30, 2004." The second certificate (hereinafter the "ICHP Certificate") is number 0003626222 from the International Commission on Healthcare Professions, a division of CGFNS, as issued June 24, 2005, to the beneficiary in the profession of a registered nurse.

Counsel makes three contentions on appeal.

First, counsel states that the AAO when it made its decision dated July 21, 2006, "mistook" the wrong document, (i.e. the ICHP Certificate), "as opposed" to the CGFNS Certificate to determine eligibility for Schedule A classification under 20 C.F.R. § 656.2(c)(2). Second, counsel states that "To prove eligibility for

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- (i) The name, address, and telephone number of the credentialing organization, and a point of contact to verify the validity of the certificate;
 - (ii) The date the certificate was issued;
 - (iii) The health care occupation for which the certificate was issued; and
 - (iv) The alien's name, and date and place of birth.

Schedule A classification, petitioner submitted a document dated December 30, 2004 (CGFNS Certificate) and therefore evidence was submitted under the regulations to establish eligibility.”

As noted above in this discussion, we have carefully and completely enumerated all relevant evidence submitted by the petitioner in this case that accompanied the petition that was received in response to the request for evidence and submitted by substitute counsel on appeal.

To repeat counsel’s contention, “... petitioner submitted a document dated December 30, 2004 (CGFNS Certificate)” prior to the AAO’s decision on July 21, 2006. We did not find the CGFNS certificate mentioned by counsel accompanying the petition or submitted in response to the director’s request for evidence although we acknowledge that on motion substitute counsel has submitted a copy of a CGFNS Certificate “issued December 30, 2004.” That copy appears on its face to be a photocopy of a fax transmittal from College Hospital dated August 3, 2006. However, there is no explanation in the record of proceeding why the CGFNS Certificate was withheld until this subject motion.

The director in the request for evidence dated October 18, 2005, stated:

CERTIFICATION: In accordance with 20 C.F.R. § 656.10(a)(2), an employer seeking a Schedule A labor certification as a professional nurse, shall file, as part of its labor certification documentation that the alien:

- a. Has passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or
- b. Holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment.

Please submit documentation to verify the beneficiary has passed the CGFNS examination and was issued a CGFNS certificate or holds a full and unrestricted license to practice professional nursing in the State of intended employment prior to Priority Date....

The regulation at 8 C.F.R. § 103.2(b)(8) states the following:

Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or [CIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence. . . . In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence. Additional time may not be granted.

Additionally, the regulation at 8 C.F.R. § 103.2(b)(13) states the following: “*Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied.”

The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). According to the chief executive officer of the petitioner, [REDACTED] in a letter dated December 22, 2004, the beneficiary possessed on that date a Bachelor’s of Science degree in nursing, a Republic of the Philippines registered nurse’s license and a Commission on Graduates of

Foreign Nursing Schools (CGFNS) certificate. The CGFNS certificate submitted now by counsel did not accompany the petition.

The web page from the Internet site <<https://www.cgfns.org>> dated December 20, 2004, from CGFNS accompanying the petition indicates that the candidate's education documentation was received, but not reviewed and therefore it was not confirmed by CGFNS. Therefore it was premature to state that the beneficiary possessed on December 22, 2004, a CGFNS certificate. Also, since the CGFNS certificate submitted on motion was issued on December 30, 2004, the beneficiary did not pass the CGFNS exam prior to the priority date of December 30, 2004 as required by the regulation at 20 C.F. R. § 656.10(a)(2).

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As already stated, substitute counsel makes three contentions on appeal. The first two assertions were discussed **above**. The third relates to the ICHP Certificate with the beneficiary's identifying number from the International Commission on Healthcare Professions, a division of CGFNS as issued June 24, 2005. Since it is the CGFNS Certificate document issued December 30, 2004, that is required by 20 C.F. R. § 656.10(a)(2) we will not discuss the ICHP Certificate further.⁸

We find the evidence submitted did not demonstrate that the beneficiary had passed the CGFNS examination prior to the priority date of the petition filed for preference classification in the occupation of registered nurse in this case, and, that the beneficiary had not met the minimum requirements at the time that the request for certification was filed.

CIS electronic records indicate that the petitioner has filed 1090 other I-140 petitions⁹ which have been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2).

⁸ Counsel stated upon appeal that the ICHP Certificate only had relevance to the beneficiary's adjustment application but as already discussed above, according to the regulation at 8 C.F.R. § 212.15 (f), it also relates to the beneficiary's licensure examination among other professional criteria achievements.

⁹ According to the regulation at 8 C.F.R. § 204.5(g)(2), "In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." The petitioner stated in the I-140 petition that it has 626 employees. The letter from the petitioner's chief financial officer dated December 22, 2004, stating that number under the circumstances cannot be used as proof that the petitioner has the ability to pay the proffered wage for 1090 other employees.

Additionally, the record in the instant case contains no information about the proffered wages for the beneficiaries of the other 1090 I-140 petitions submitted by the petitioner, nor about the current immigration status of those beneficiaries, whether those beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to those beneficiaries. Furthermore, no information is provided about the current employment status of those beneficiaries, the date of any hirings of beneficiaries and any current wages of those beneficiaries.

The petitioner has not demonstrated that the petition was approvable when submitted and pursuant to *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). It may not be approved. The petition will be denied for the above reasons, with each considered as an independent and alternate basis for denial. 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 motion to reopen is granted and the decision of the AAO dated July 21, 2006 is affirmed. The petition is denied.