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U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: EAC-02-172-52719 Office: VERMONT SERVICE CENTER Date: AUG 2 1 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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 immigrant visa petition was denied by the director of the 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 permanently employ the beneficiary 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 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.

On appeal, counsel submits a brief and copies of evidence formerly submitted into the record of proceeding as well as a piece of new evidence, namely, a posting notice. 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 during consular processing prior to entering the United States as lawful permanent residents. 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 April 24, 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 academic credentials and license to practice nursing in the Philippines. Because the evidence was insufficient to adjudicate the petition, the director issued a request for evidence on September 19, 2002 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 letter requesting additional time to respond to the request for evidence.

Counsel requested a sixty day extension to respond to the director's request for evidence and subsequently, nearly seven weeks after the original due date, provided a responsive submission. In response to the request for proof of the beneficiary's qualifications, counsel stated the following:

> [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 exclusion 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 April 7, 2003 for failure to produce proof that the beneficiary passed the CGFNS examination or had an unrestricted license to practice nursing. 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 Thomas E. Cook, 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."

At the outset, the director erred in accepting the petitioner's untimely response to the request for evidence.[1] The petitioner was provided 84 days (twelve weeks) to provide a response to the director's request for evidence. Three additional days were provided because the request for evidence was sent to the petitioner by mail. The

[1] The director correctly noted that no extension of time may be granted for a response to a request for evidence.

request for evidence was issued on September 19, 2002. The response was due on December 15, 2002, including the additional three days. The petitioner's response was dated January 31, 2003.

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: "(13) *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 regulations are clear that failure to respond to a request for evidence *shall* be considered abandoned and denied (emphasis added). Thus, the director should not have exercised favorable discretion in accepting late evidence and should have denied the petition as abandoned for failure to provide a timely response to the director's request for evidence.

Since the director adjudicated the case on the merits, the AAO will address the substantive issues that arise on appeal. 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 bold 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. 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). As the director properly reviewed the record before him, it was impracticable for the director to provide the petitioner with an explanation as to why the prior approvals were erroneous, as counsel suggests.

Counsel states that CIS approved other petitions that had been previously filed on behalf of other nurses sponsored by the petitioner. The director's decision does not indicate whether he reviewed the prior approvals of any other immigrant petitions. If the previous immigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute clear and gross error on the part of the director. 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 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petitions on behalf of the beneficiary, 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*, 122 S.Ct. 51 (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 exclusionary ground applicable in a consular processing or adjustment of status scenario, it also clearly permits CIS to ascertain the beneficiary's qualifications in the Schedule A context during the I-140 stage. Counsel quotes letters written during the context of temporary regulatory change and a cable from a different administrative agency – neither of which constitutes established policy. Furthermore, letters and correspondence issued by the Office of Adjudications are not binding on the AAO. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

The record reflected no license or CGFNS examination results as of 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* section 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, the 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.

Beyond the decision of the director, the record does not contain evidence that the petitioner fully complied with regulatory requirements governing the posting notice. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The regulation at 20 C.F.R. § 656.20 requires 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:

> The position was not posted. However, there is a union that represents the workers in the position that the beneficiary will fill, and the union representative was informed by letter of the petitioner. I have attached as **Exhibit 5** a copy of the letter.

(Emphasis in original). At the outset, it is noted that 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). However, the merits of the posting notice need not be scrutinized for the reasons discussed below.[2]

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).

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal without any explanation concerning its prior unavailability. However, the AAO will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Thus, the petitioner's failure to submit the posting notice in response to the director's request for evidence precluded a material line of inquiry and was properly a ground for denial.

Also beyond the decision of the director, there is no probative evidence of the petitioner's ability to pay the proffered wage. *See Spencer,* 229 F. Supp. 2d. at 1043. Although the director requested evidence of the petitioner's ability to pay the proffered wage, there is no evidence in the record of proceeding pertinent to that issue.

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.

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[2] It is noted, for the record of proceeding, however, that counsel attached a copy of a posting notice, not a letter to a union representative. It is further noted that the petitioner has handled this substantive issue differently in other similar petitions also pending on appeal. In those other appeals, the petitioner's counsel provided a posting notice and stated that a union representative did not exist.

In response to the director's request for evidence, the record of proceeding contains an unaudited financial statement. The regulations specifically require evidence that includes an audited financial statement. Thus, the petitioner failed to produce evidence of its ability to pay the proffered wage by any forms of evidence mandated by the regulation at 8 C.F.R. § 204.5(g)(2).

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.