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U.S. Citizenship and Immigration Services

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FILE: EAC 02 244 51449 Office: VERMONT SERVICE CENTER Date: AUG 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 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 notice of filing the Application for Alien Certification was not properly provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

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.[1] 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.

The employer must also comply with the procedure set forth to post the availability of the job opportunity to interested U.S. workers. The regulation at 20 C.F.R. § 656.20(g)(1) provides:

> 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)

If an application is filed under the Schedule A procedures, the notice must contain a description of the job and rate of pay, must state that the notice is being provided as a result of a filing of an application for a permanent alien labor certification, and must state that any person may provide documentary evidence relevant to the application to the local DOL employment service office and/or to the regional DOL certifying officer. 20 C.F.R. § 656.20(g)(8); 20 C.F.R. § 656.20(g)(3)(ii) and (iii).

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[1] 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).

In this case, the immigrant visa petition was filed on July 17, 2002. The ETA-750A accompanying the petition establishes that the position of registered nurse pays $24.79 per hour. The petitioner initially failed to submit sufficient evidence that the beneficiary had either passed the CGFNS examination or that she holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment. The director also 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 the beneficiary 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 proof that the alien beneficiary passed the CGFNS on November 13, 2002. Counsel also submitted a copy of an undated job posting describing 64 openings for registered nurses at the stated rate of pay set forth in the petitioner's Form ETA-750A contained in the record, as well as photocopies of four advertisements describing various nursing positions and inviting interested applicants to come to an "open house" to be held in early 2002. These photocopies indicate that they may have appeared in "Nursing Spectrum." A fifth advertisement contains descriptions for openings for medical personnel other than registered nurses. Counsel claims in his cover letter that the job posting was placed on the petitioner's bulletin board on or about August 25, 2002, and remained until September 29, 2002. He also states that the advertisements are copies of notices placed in various newspapers and represent the petitioner's continuous recruitment efforts.

The director denied the petition, while acknowledging that the petitioner had submitted evidence of the beneficiary's passage of the CFGNS examination, the petitioner had failed to provide satisfactory evidence that it had properly posted the notice of filing of the ETA 750 and job opening as of the petition's priority date. For the reasons discussed below, the AAO concurs with the director's decision regarding the deficiencies of the petitioner's notice of filing, but disagrees with the director that the alien's successful passage of the CGFNS four months after the priority date establishes eligibility for approval. The AAO further notes that the record contains no evidence establishing the petitioner's ability to pay the beneficiary's proposed wage offer.

The AAO concurs with the director's denial of the petition based on the petitioner's failure to provide acceptable evidence, as of the priority date of July 17, 2002, that a notice of filing an application for an ETA-750 and job opportunity had been provided to the bargaining representative, or if no bargaining representative, had been posted in accordance with 20 C.F.R. § 656.20(g)(3).

On appeal, counsel mischaracterizes the content of the director's decision and states that the director questions "whether the beneficiary is required to present to the Center Director either a CGFNS certificate or proof of having passed the NCLEX (for the State of intended employment) in order to get approval of an I-140 for a registered nurse. The AAO does not find such a rationale within director's decision. Counsel's brief does not directly address the facts in this case because the beneficiary actually submitted proof of passage of the CFGNS to the record.

As previously noted, under Schedule A certifications, the petition's filing date establishes the priority date. 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 this case, although the evidence shows that the beneficiary successfully passed the CFGNS examination, this did not occur until well after the priority date was established. Therefore, the petitioner failed to establish the beneficiary's qualifications as of the priority date of July 17, 2002.

On appeal, counsel also claims that the petitioner mistakenly reported the date of the first posting of the job notice as August 25, 2002, rather than the actual date of June 10, 2002. Counsel states that the petitioner's error is attributable to the fact that the job posting was undated and that there were a number of postings made for permanent resident cases. Counsel now claims that the posting was from June 10, 2002 until September 29, 2002, when it was supposed to be removed. Counsel states, however, that it was never removed. He further maintains that the copies of advertisements were only submitted in order to show the petitioner's need for registered nurses.

The regulation at 8 C.F.R. § 103.2(b)(12) states, in pertinent part:

> An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility *at the time the application or petition was filed.*

(Emphasis supplied); *See also, Matter of Katigbak,* 14 I&N Dec. at 49. In this case, notwithstanding counsel's assurances to the contrary, the record contains no first-hand evidence from the petitioner that the applicable posting was completed for ten consecutive days prior to the visa priority date of July 17, 2002. Evidence of such posting should be submitted with the Application for Alien Employment Certification establishing that an attempt to provide notice to any interested U.S. applicant has been completed. Counsel's assertion on appeal of how the petitioner erred in determining the dates of posting is not persuasive and cannot constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

It is further noted that the petitioner's posting of the registered nurse position does not comply with 20 C.F.R. § 656.20(g)(3)(iii), which, as noted above, requires the employer to state "that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor." The petitioner's job posting contained in the record advises interested applicants that they may contact the "Personnel Office, the Nurse Recruiter, the Director of Nursing or the New York State Department of Labor" . . . , and therefore does not conform to the regulatory requirement.

As the petitioner has not submitted evidence that a proper job offer posting had occurred as of the filing date of the Application for Alien Employment Certification and Form I-140, the petitioner has not established eligibility as of the priority date of the petition. Consequently, the petition may not be approved for this additional reason.

On appeal, apparently as an argument in the alternative, counsel states that a petitioner need not submit evidence of the beneficiary's passage of the CGFNS or NCLEX-RN examination, or show state licensure in conjunction with the submission of an I-140 based on an application for Schedule A labor certification. Counsel maintains that such evidence need not be produced prior to the beneficiary's appearance at a consular office or an adjustment hearing. In support of this reasoning, counsel submits copies of various regulations applicable to immigrant visas, a copy of a letter from the Office of Examinations of the Service, now CIS, dated January 28, 1997, a 1996 copy of a Department of State cable, and 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. 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.[2]

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 (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 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 (5th 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 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 examination 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 petitioner met 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 they 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

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[2] 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).

examination result to the adjudication process.[3] 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.

As discussed above, the record in this case does not contain evidence that the beneficiary passed the CGFNS (or RN-NCLEX) examination as of the priority date, or holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment. Nor does the record establish that the petitioner complied with the regulatory requirements relating to the posting of the notice of job opportunity and the filing of the ETA-750.

Beyond the decision of the director, it is 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.

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.

[3] 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.