Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
	DATE: March 16, 1992
Catherine Dodd,	
Petitioner,	Docket No. C-384
	Decision No. CR184
- v. -	
The Inspector General.	

DECISION

On April 18, 1991, the Inspector General (I.G.) notified Petitioner that she was being excluded from participation in Medicare and State health care programs for a period of five years.[1] The I.G. told Petitioner that she was being excluded as a result of her conviction of a criminal offense related to the delivery of an item or service under Medicare. Petitioner was advised that the exclusion of individuals convicted of such an offense is mandated by section 1128(a)(1) of the Social Security Act (Act). The I.G. further advised Petitioner that the required minimum period of such an exclusion is five years. The I.G. informed Petitioner that she was being excluded for the minimum mandatory five year period.

On May 8, 1991, Petitioner timely requested a hearing and the case was assigned to me for hearing and decision. The I.G. moved for summary disposition. Petitioner filed a written response to the I.G.'s motion for summary disposition.

On November 8, 1991, I issued a ruling which denied the I.G.'s motion for summary disposition on the grounds that the I.G. had not proven that Petitioner was convicted of

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[1] "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally-financed health care programs, including Medicaid. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

a criminal offense related to the delivery of a Medicare or Medicaid item or service. In that ruling, I stated specifically that the evidence presented by the I.G. was insufficient to establish that Petitioner had been convicted of a criminal offense within the meaning of §1128(a)(1). I provided examples of evidence which would meet the statutory test for a conviction related to the delivery of a Medicare or Medicaid item or service. Ruling Denying the Inspector General's Motion for Summary Disposition, November 8, 1991.

I gave the I.G. until December 16, 1991 to renew his motion for summary disposition. The I.G. timely renewed his motion. During a January 31, 1992 telephone conference, I advised the I.G. that the documents which he submitted in connection with his initial and renewed motion for summary disposition still did not provide proof that Petitioner had been convicted of a criminal offense within the meaning of section 1128(a)(1).[2] However, because my November 8, 1991 ruling did not specifically state that I would decide the case in favor of Petitioner in the event the I.G. did not meet his burden, I told the I.G. that I would allow him until February 14, 1992 to again either renew his motion for summary disposition or to advise me that he desired an in-person evidentiary hearing. I further advised the I.G. that, if he elected again to move for summary disposition and again failed to satisfy me that he had established a basis for excluding Petitioner under section 1128(a)(1), I would enter summary disposition in Petitioner's favor.

On February 14, 1992, the I.G. submitted his second renewed motion for summary disposition. I have carefully considered the evidence offered by the I.G. in connection with his initial motion for summary disposition and in his two renewed motions. For purposes of this decision, I have accepted all of the facts as alleged by the I.G. as true. I conclude that the I.G. has not established that Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act. The I.G. has not proved that he has authority to exclude Petitioner under that section. Therefore, I enter

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[2] This conference was conducted without Petitioner's participation. Several attempts were made to advise Petitioner of the conference. However, the telephone number which Petitioner had provided for contact purposes was no longer valid, and Petitioner did not respond to written notification sent to her last known address.

summary disposition in favor of Petitioner, vacating the exclusion imposed and directed against her by the I.G.

ISSUE

The issue before me in this case is whether Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid within the meaning of section 1128(a)(1) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On May 31, 1990, Petitioner pled guilty to, and was convicted of, the offense of knowingly or intentionally making a false written statement to obtain property, in violation of Texas Penal Code Annotated, Section 32.32. I.G. Ex. 1; Hughes Aff. 1.[3]

2. Petitioner admitted that the criminal activity for which she was convicted occurred on October 1, 1989. I.G. Ex. 1.

3. The criminal charge against Petitioner, her plea of guilty and conviction, resulted from an investigation conducted by the Texas Attorney General's Medicaid Fraud

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[3] I refer to the I.G.'s original July 24, 1991, brief in support of motion for summary disposition as I.G. Br. (number/page). The I.G. attached four exhibits to his first motion, which he designated as Exhibits 1 through 4. I refer to the I.G.'s exhibits as I.G. Ex. (number designation)/(page). The I.G. also submitted the sworn affidavit of William J. Hughes, Program Analyst in the I.G.'s Dallas office. Mr. Hughes's affidavit, unlike the other I.G. submissions, was not marked as an exhibit. I refer to it as Hughes Aff. (page number). Petitioner submitted her written reply to the I.G.'s motion and a typewritten letter that was originally sent by her to the Texas Department of Human Services to contest her exclusion. I will refer to Petitioner's typewritten letter as Pet. Let. (page number). After my November 8, 1991 Order, the I.G. submitted a renewed motion for summary disposition and a supporting brief, which I refer to as I.G. Mot. (page number). The I.G. attached one exhibit to his renewed motion, which I refer to as I.G. Ex. 5. I refer to the I.G.'s second renewed motion, submitted on February 14, 1992 as I.G. Second Ren. Mot. The I.G. attached exhibits 6, 7 and 8 to his second renewed motion. I admit into evidence all I.G. exhibits, including the Hughes affidavit, and Petitioner's letter.

Unit beginning November 27, 1989 at the Brookhaven Nursing Center in Cheyenne, Texas. I.G. Ex. 2.

4. Brookhaven Nursing Center is a medical facility receiving funds under the Texas Medicaid Program. I.G. Ex. 2.

5. Petitioner admitted to Nora E. Longoria, the investigator for the Texas Attorney General's Medicaid Fraud Unit, that she had converted for her own use medications provided for four patients (Peggy Bang, Dorothy Crowson, Creda Hoga, and James Martin) and had falsified these patients' treatment records. I.G. Ex. 2.

6. On November 28, 1989, Petitioner signed a statement which was witnessed by Ms. Longoria, in which Petitioner admitted that, starting around the beginning of October, 1989, she had converted to her own use medications provided for residents at the Brookhaven Nursing Facility. I.G. Ex. 8.

7. In her statement, Petitioner admitted converting to her own use medication provided for patients, including Creda Hoga, Dorothy Crowson, Peggy Bang, Gertrude Clark, and James Martin. I.G. Ex. 8.

8. James Martin was not a resident at the Brookhaven Nursing Facility on October 1, 1989. I.G. Ex. 6.

9. Creda Hoga was a resident at the Brookhaven Nursing Facility on October 1, 1989, and was a Medicare beneficiary occupying a Medicare skilled nursing facility bed as of that date. I.G. Ex. 6.

10. Dorothy Crowson was a resident at the Brookhaven Nursing Facility on October 1, 1989, and was eligible for Medicaid. I.G. Ex. 5.

11. The I.G. did not prove that Brookhaven Nursing Facility presented a claim to a Medicaid program for items or services provided to Dorothy Crowson on October 1, 1989. I.G. Ex. 6.

12. Peggy Bang was a resident at the Brookhaven Nursing Facility on October 1, 1989, and was eligible for Medicaid. I.G. Ex. 5.

13. The I.G. did not prove that Brookhaven Nursing Facility presented a claim to a Medicaid program for items or services provided to Peggy Bang on October 1, 1989. I.G. Ex. 6.

14. The I.G. did not prove that Gertrude Clark was a resident at the Brookhaven Nursing Facility on October 1, 1989, and did not prove that Gertrude Clark was either a Medicare beneficiary or a Medicaid recipient.

15. The Judgment of Conviction which was entered against Petitioner does not name the individual whose medical records were falsified by Petitioner. I.G. Ex. 1.

16. The I.G. has not established by extrinsic evidence the name of the individual whose medical records Petitioner was convicted of falsifying. See I.G. Ex. 1 - 8.

17. Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Act.

18. The I.G. did not prove that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid.

19. There are no disputed issues of material fact in this case and summary disposition is appropriate.

20. The I.G. has not proven that he has authority to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

ANALYSIS

The threshold issue in this case is whether Petitioner was "convicted" of a criminal offense within the meaning of section 1128(i) of the Act. Petitioner's plea of guilty to criminal charges in a Texas State court meets the statutory definition of conviction. Section 1128(i)(3) defines a conviction to include the circumstance where a plea of guilty has been accepted by a State court. Here, Petitioner pleaded guilty to a crime and that plea was accepted. Findings 1 and 17.

The issue which is central to this case is whether Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid program, within the meaning of section 1128(a)(1) of the Act. Inasmuch as the I.G. excluded Petitioner pursuant to this section, the I.G. must show that her conviction fell within the meaning of that section in order to establish that he had the authority to exclude Petitioner.

The relevant facts of this case are detailed below. Petitioner was employed as a nurse at the Brookhaven

Nursing Facility, a Texas nursing facility which treats both Medicare beneficiaries and Medicaid recipients. On November 27, 1989, an investigator from the Texas Medicaid Fraud Unit confronted Petitioner concerning a discrepancy between a patient's records, which recorded that the patient was being administered a prescription medication, and the patient's assertion that, in fact, she was being administered another, nonprescription medication instead. I.G. Ex. 2.

Petitioner admitted to having converted to her own use medications which had been provided for patients at the Brookhaven Nursing Facility and falsifying patients' treatment records to cover up these acts. She denied having converted to her own use medication from the patient whose statement prompted the investigation. I.G. Ex. 2. However, she admitted to the investigator having converted to her own use medication from four named patients (Peggy Bang, Dorothy Crowson, Creda Hoga, and James Martin) and falsifying their treatment records. Id. On November 28, 1989, Petitioner signed a statement in which she admitted that "around the beginning of October" 1989, she began taking medication from patients. I.G. Ex. 8. In that statement, she named the patients whose medications she had converted to her own use as including Creda Hoga, Dorothy Crowson, Peggy Bang, Gertrude Clark, and James Martin. Id.

On May 31, 1990, Petitioner pleaded guilty in a Texas State court to the criminal charge of making a false statement to obtain property. The Judgment of Conviction and Sentence recites that the offense to which Petitioner occurred on the first day of October, 1989. I.G. Ex. 1. The document does not state the particulars of Petitioner's offense. Specifically, it does not identify the false statement which Petitioner made or the circumstances under which it was made. Id. The I.G. has offered no evidence from either the State court or from other sources connected with Petitioner's conviction (such as the prosecuting attorney) which would explain the circumstances of the offense of which Petitioner was convicted.

However, it is reasonable to infer that Petitioner's conviction emanated from the investigation at the Brookhaven Nursing Facility and Petitioner's admissions to the Medicaid investigator. In her report, the investigator recommended that Petitioner's case be referred to the local prosecutor. I.G. Ex. 2. Petitioner's admission of having begun converting patients' medication and altering their treatment records around the beginning of October, 1989, closely dovetails

with the October 1, 1989 date of the offense recited in the Judgment of Conviction and Sentence. I.G. Exs. 1, 8.

Therefore, it is reasonable to conclude Petitioner's conviction of a single count of making a false statement to obtain property relates to an episode in which Petitioner falsified the treatment records of at least one of the patients whose medication Petitioner admitted converting to her own use. These individuals include, but by Petitioner's admission, are not limited to, Creda Hoga, Dorothy Crowson, Peggy Bang, Gertrude Clark, and James Martin.

The I.G. offered evidence which establishes that, as of October 1, 1989, James Martin was not a patient at the Brookhaven Nursing Facility. His admission to the facility began on October 18, 1989. I.G. Ex. 6. Therefore, Mr. Martin could not be the patient whose records Petitioner was convicted of having falsified on October 1, 1989.

The I.G. has offered no evidence concerning Gertrude Clark. It is therefore not established that she was a patient at the Brookhaven Nursing Facility on October 1, 1989, nor is it established that Ms. Clark was receiving either Medicare or Medicaid items or services at the facility.

The I.G. has established that, as of October 1, 1989, Creda Hoga was occupying a Medicare skilled nursing facility bed at the Brookhaven Nursing Facility. I.G. Ex. 5. The I.G. has also established that Dorothy Crowson and Peggy Bang were eligible for itmes or services under the Texas Medicaid program, and that Peggy Bang was eligible for Medicare while at Brookhaven. I.G. Exs. 5, 6. However, the I.G. has offered no evidence to show that these patients' stays in the facility or any items or services which they received during their stays were covered by the Texas Medicaid program. More importantly, the I.G. has not shown, with respect to Crowson and Bang, that these patients received any Medicare or Medicaid items or services on October 1, 1989, the date that, according to the criminal information, provides the basis for Petitioner's conviction. I.G. Ex. 7.

The I.G. asserts that, based on these undisputed material facts, he has proven that Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1) of the Act. I disagree. The evidence fails to prove that Petitioner was, in fact, convicted of a criminal offense related to the delivery of an item or service

under Medicare or the Texas Medicaid program. Although the I.G. has offered evidence which shows that the offense of which Petitioner was convicted might be related to the delivery of a Medicare or Medicaid item or service, he has not adduced sufficient proof to establish that the conviction is related to the delivery of a Medicare or Medicaid item or service. The I.G. has thus failed to meet his duty to establish proof of authority to exclude Petitioner under section 1128(a)(1).

In his initial motion for summary disposition, the I.G. asserted that the requisite nexus for a conviction under section 1128(a)(1) was established by virtue of the fact that Petitioner was employed at a nursing home which treated Medicare and Medicaid patients and committed a crime during the course of her duties at that facility. As I announced in my November 8, 1991 ruling, I was not persuaded by that argument, and I restate the reasons here.

Section 1128(a)(1) specifically requires that, as a basis for an exclusion, a party must be convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid. The fact that an individual commits a crime during the course of his or her employment by a facility which receives Medicare or Medicaid reimbursement is not in and of itself sufficient to meet the statutory test, because such a conviction would not necessarily relate to the delivery of a Medicare or Medicaid item or service.

The I.G.'s theory, expressed in his initial motion for summary disposition, is so broad as to make any criminal offense committed on the premises of a facility which receives Medicare or Medicaid reimbursement a criminal offense within the meaning of section 1128(a)(1). The logical extension of his argument would, for example, encompass a simple battery by an employee on a coworker. This analysis departs from the plain meaning of the Act. Furthermore, it would make section 1128(a)(1) so broad in its application as to render virtually meaningless the remainder of sections 1128(a) and (b).

The Act does not define the term "criminal offense related to the delivery of an item or service." However, a criminal offense has been held to meet the statutory test where the delivery of an item or service is an element in the chain of events giving rise to the item or service. Jack W. Greene DAB 1078 (1989); aff'd sub nom. Greene v. Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. 1990) (Greene); Larry W. Dabbs, R. Ph. et al., DAB CR151 (1991) (Dabbs). A criminal offense has also been held to

meet the statutory test where Medicare or a Medicaid program was the victim of a party's criminal offense. Napoleon S. Maminta, M.D., DAB 1135 (1990) (Maminta).

In Greene, the petitioner was convicted of filing a fraudulent Medicaid reimbursement claim. An appellate panel of the Departmental Appeals Board held that the offense was an offense within the meaning of section 1128(a)(1), inasmuch as it arose from the providing of a Medicaid item or service (a prescription for a Medicaid-covered drug). In Dabbs, the petitioners were convicted of the crime of mislabeling drugs. I concluded that this offense was related to the delivery of a Medicaid item or service. The basis for my conclusion was that the act of mislabeling grew out of events which necessarily included the petitioners' filling certain prescriptions for Medicaid items or services and presenting Medicaid reimbursement claims for those items or services.

In Maminta, an appellate panel sustained findings that the petitioner had been convicted of a criminal offense consisting of unlawfully converting to his use a Medicare reimbursement check which was payable to another party. The appellate panel held that petitioner had been convicted of a criminal offense within the meaning of section 1128(a)(1), in that Medicare was the victim of his crime.

The I.G. has not contended that Petitioner was convicted of having converted to her use medications which belonged to Medicare or Medicaid. Nor has the I.G. asserted that these programs were the victims of Petitioner's crime. Therefore, the I.G. is not arguing that Petitioner's offense falls within the Maminta test.

Thus, in order for me to find that Petitioner was convicted of a criminal offense within the meaning of section 1128(a)(1), I must find some nexus between Petitioner's conviction and an identified Medicare or Medicaid item or service. The starting point for deciding whether the test has been met here is to analyze the status of the patients whose medications were converted by Petitioner and whose records were falsified. However, as I stated in my November 8, 1991 ruling, that is only the starting point of the analysis.

The document containing Petitioner's guilty plea identifies the date on which her crime occurred (October 1, 1989) and the nature of her offense (making a false statement to obtain property). It does not identify the specific false statement made by Petitioner. Therefore, it is not possible to ascertain from this document

whether Petitioner was in fact, convicted of a criminal offense within the meaning of section 1128(a)(1).

That is not necessarily fatal here. As I hold above, it is apparent that Petitioner's conviction emanated from her admission that she had converted medications prescribed to patients at the Brookhaven Nursing Facility. And, although there is some ambiguity in her admission of culpability, she identified the names of the patients whose medications she admitted converting and whose records she admitted falsifying.

Inasmuch as the Judgment of Conviction and Sentence does not name the individual whose records Petitioner falsified, it is possible that the conviction might relate to any of the individuals named by Petitioner. Furthermore, the Judgment of Conviction and Sentence is written ambiguously, so as to possibly subsume a chain of events which does not relate to a Medicare or Medicaid item or service. Therefore, in order to establish the nexus to a Medicare or Medicaid item or service required under the Greene and Dabbs decisions, I must find that the statutory test would be satisfied with respect to items or services provided to any of the individuals whose medications Petitioner admitted to having converted and whose records Petitioner admitted having falsified. The I.G. must show that any chain of events which possibly could have been the basis for Petitioner's conviction was related to the delivery of an item or service under Medicare or Medicaid.

This case is very similar to the case of Bruce Lindberg, D.C., DAB 1280 (1991) (Lindberg). Lindberg was a case in which the I.G. had excluded the petitioner pursuant to section 1128(a)(2) of the Act, based on his conclusion that the petitioner had been convicted of a criminal offense related to patient neglect or abuse in connection with the delivery of a health care item or service. An appellate panel found that the evidence offered by the I.G. to support his determination was inadequate to establish that the individuals referred to in documents relating to the petitioner's conviction were patients of petitioner or that the abuse of which petitioner was convicted occurred in connection with the delivery of a health care item or service.

While the petitioner originally had been charged with eight counts of abuse, he had pleaded guilty to only four of them. It was apparent from the documents relative to the petitioner's case and from the undisputed material facts, that some but not all, of the individuals whom petitioner had been charged with abusing were his

patients. The appellate panel concluded that it was not possible to determine from the documents pertaining to petitioner's conviction that the four individuals whom petitioner was convicted of having abused were petitioner's patients. Therefore, the requisite nexus for a conviction under section 1128(a)(2) had not been proven by the I.G. Lindberg at 7 - 8.

The appellate panel found further that the evidence did not establish that the offenses of which the petitioner were convicted occurred in connection with the delivery of a health care item or service. Six of the eight individuals whose complaints formed the basis of the criminal charges against petitioner asserted that the abuse which petitioner allegedly committed was committed in connection with the delivery of a health care service. However, the appellate panel found that the record did not establish that the offenses to which the petitioner pleaded necessarily consisted of the offenses which were asserted as having been committed in connection with the delivery of a health care service. Lindberg at 8 - 9. The fact that such could have been the case was not enough to establish the requisite nexus under the Act.

The I.G. has failed to establish the requisite nexus here, even as he failed to do so in Lindberg. First, it is not clear from the undisputed material facts that all of the patients whose medications could have been converted by Petitioner on October 1, 1989, and whose records could have been falsified by her on that date, were Medicare beneficiaries or Medicaid recipients. It is possible that the conviction could have related to Petitioner's admitted conversion of medications prescribed to Gertrude Clark and to Petitioner's falsification of Gertrude Clark's treatment records. Yet, the I.G. has offered no evidence to identify whether Ms. Clark was a patient at the facility on October 1, 1989, or whether she was a Medicare beneficiary or Medicaid recipient.

Furthermore, the I.G. has not established that Petitioner's conversion of medications and falsification of treatment records related to Medicare or Medicaid items or services in each circumstance which could have been the basis for her conviction. In my November 8, 1991 ruling, I ruled that it would be insufficient for the I.G. to show merely that the patients whose medications Petitioner misappropriated were Medicare beneficiaries or Medicaid recipients. I ruled then, and hold now, that the patients' status as beneficiaries or recipients does not by itself show that there were Medicare or Medicaid items or services from which

Petitioner's crime emanated. Simply proving that these patients were eligible for program-related items or services does not preclude the possibility that no Medicare or Medicaid items or services were supplied to them at the facility, and that there was no connection, therefore, between a Medicare or Medicaid item or service and Petitioner's crime.

I pointed out in my ruling that the I.G. could satisfy the Greene or Dabbs tests, assuming he showed that all of the patients whose medications were converted by Petitioner were Medicare beneficiaries or Medicaid recipients, by proving any of the following:

> 1. The misappropriated medication which formed the basis of Petitioner's conviction was a Medicare or Medicaid item or service. In that event, her falsification of treatment records would directly relate to her conversion of medication supplied under Medicare or Medicaid to a patient.
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> 2. The misappropriated medication which formed the basis of Petitioner's conviction was not a Medicare or Medicaid item or service, but was prescribed as an element of some other treatment which was a Medicare or Medicaid item or service (such as to alleviate pain following surgery).
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> 3. The misappropriated medication which formed the basis of Petitioner's conviction was not a Medicare or Medicaid item or service, but was provided during the course of an inpatient stay which was a Medicare or Medicaid item or service.

In subsequent submissions, the I.G. offered evidence which satisfies me that Creda Hoga was receiving a Medicare item or service during her stay at the Brookhaven Nursing Facility. I.G. Ex. 6. The I.G. has not clearly established that the medications provided to Ms. Hoga which were converted by Petitioner, were Medicare items or services. However, I believe it reasonable to conclude that these medications were at least provided ancillary to Ms. Hoga's Medicare-covered stay. Therefore, I conclude that, if Petitioner's conviction relates to medications misappropriated from Ms. Hoga and to falsification of her records, it would relate to the delivery of a Medicare item or service.

As I hold above, I am satisfied that Dorothy Crowson and Peggy Bang were eligible for Medicaid items or services. However, the I.G. has never offered proof that these individuals' stays at the facility or their medications were items or services which were covered by the Texas Medicaid program. In fact, as I.G. Ex. 6 shows, no claims were submitted for a Medicaid item or service for either Crowson or Bang on October 1, 1989. Specifically, I.G. Ex. 6 states that Peggy Bang had no Medicaid prescription claims paid between September 1, 1989 and April of 1990. I.G. Ex. 6 also states that there were no Medicaid claims submitted for Crowson from September 1, 1989 through May of 1990.

Inasmuch as James Martin was not a patient at the facility on October 1, 1989, I can conclude that he could not possibly have been the basis for Petitioner's criminal conviction. As I hold above, the I.G. has provided me with no evidence which would enable me to decide whether Gertrude Clark was receiving any Medicare or Medicaid items or services on October 1, 1989. Thus, of the five patients whose medication Petitioner admitted misappropriating, the I.G. has established that only one, Creda Hoga, was receiving Medicare (or Medicaid) items or services on October 1, 1989. Inasmuch as it is possible that Petitioner's conviction may relate to any of the patients whose medication she admitted falsifying records to obtain, the I.G. has not established the requisite nexus between a federally funded health care program and Petitioner's conviction.

The appellate panel remanded the Lindberg case so that the administrative law judge could receive additional evidence as to the unresolved questions of material fact. I can discern no legitimate reason why I should provide the I.G. with yet another opportunity in this case to prove that he had authority to exclude Petitioner under section 1128(a)(1). I have provided the I.G. with three opportunities to provide the necessary evidence in this case and the I.G. has continued to fail to meet his burden of proof.

My November 8, 1991 ruling provided the I.G. with explicit instructions as to what I would consider to be necessary evidence to satisfy me that a basis existed to exclude Petitioner under section 1128(a)(1). The I.G.'s renewed motion for summary disposition did not provide me with that which I told him I must have. I advised the I.G. by telephone, on January 26, 1992, that his renewed motion was inadequate. I again explicitly told him what would be necessary to establish authority to exclude Petitioner under section 1128(a)(1). I directed the

I.G.'s attention to the Lindberg decision during that call. I gave the I.G. the option of an in-person evidentiary hearing, should he desire one. I gave the I.G. until February 14, 1992 to offer evidence establishing his authority to exclude and told him that if he did not meet his bruden of proof, I would enter summary disposition in Petitioner's favor. In spite of this, the I.G.'s latest submission is again inadequate. Under the circumstances, I would deny Petitioner due process if I were to provide the I.G. with still another opportunity to offer evidence. I have no reasonable choice but to find that the I.G. has failed to prove that he has authority to exclude Petitioner. Accordingly, I enter summary disposition in favor of Petitioner.[4]

CONCLUSION

Based on the undisputed material facts and the law, I conclude that the I.G. has not proven that Petitioner was convicted of a criminal offense related to the delivery of an item or service under Medicare or Medicaid within the meaning of section 1128(a)(1) of the Act. I therefore enter summary disposition in favor of Petitioner, vacating the exclusion which the I.G. imposed and directed against Petitioner.

/s/

Steven T. Kessel
Administrative Law Judge

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[4] Perhaps the most troubling aspect of this case is that I believe that there exists evidence which would resolve the unresolved fact questions, and, possibly, establish the requisite nexus to provide authority to exclude Petitioner under section 1128(a)(1). For example, I have absolutely no doubt that the I.G. could easily establish whether or not Ms. Crowson and Ms. Bang were receiving Medicaid items or services on October 1, 1989. I see no reason why the I.G. could not resolve Ms. Clark's status. But the I.G. has the burden of proof in this case. If he fails to meet that burden, I must act accordingly.