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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 07 118 52071 Office: VERMONT SERVICE CENTER Date: NOV 2 4 2008

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.

John Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a not-for-profit hospital system that seeks to employ the beneficiary in a position entitled "Registered Nurse, BSN Staff Nurse 1." It endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the proffered position does not qualify as a specialty occupation. On appeal, the petitioner submits a brief stating that the offered position qualifies as a specialty occupation.

The issue to be discussed in this proceeding is whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), defines the term "specialty occupation" as an occupation that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> [A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

> *(1)* A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
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> *(2)* The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a registered nurse (BSN Staff Nurse 1). Evidence of the beneficiary's duties was set forth in the Form I-129 petition with supporting documentation, and in the petitioner's response to the director's request for evidence. According to the evidence, the beneficiary would:

Demonstrate the ability to effectively apply nursing theory to professional nursing practice;

- Demonstrate the ability to assess and communicate multiple complex problems and prioritize appropriate implementation plans;
- Demonstrate the ability to assess patient needs from a holistic standpoint and integrate this knowledge into a plan of care to meet all identified needs;
- Integrate the concept of nursing process into the consistent execution of quality care delivery;
- Demonstrate the ability to conclude appropriate nursing diagnosis driven by assessed subjective and objective patient data;
- Demonstrate the effective assessment skills that provide specific data on ADL's, physiological and psychological needs, perceptions and expectations of patients/S.O., and assess discharge planning needs;
- Identify and document common and potential patient problems, symptoms and behavioral changes in relation to standards of care and individual patient needs, demonstrating an understanding of basic pathophysiology relative to the disease process;
- Prepare nursing plans that reflect current nursing practice for the patient population on the unit and identify realistic measurable outcomes;

- Document all aspects of patient care using the correct format and appropriate forms including observation, evaluation and patient response;

- Identify and record verbal and non-verbal communication problems regarding the patient/family;

- Demonstrate effective teaching of basic skills with the patient/family relative to the disease process, treatment plan, rehabilitation and wellness health plan by communicating, teaching and client response, both verbally and in the medical record;

- Demonstrate clinical performance which reflects knowledge, common sense, and good judgment as evidenced by: the ability to identify and seek appropriate problem solutions in areas of patient care; acting appropriately in crisis situations; making safe and knowledgeable use of equipment; and showing flexibility and adjusting well to changing situations; and

- Participate in educational programs to increase professional competence and to meet personal needs and goals, and attend mandatory in-service training.

The petitioner requires a minimum of a bachelor's degree in nursing or its equivalent for entry into the proffered position.

The petitioner has not met any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify the offered position as a specialty occupation. The job responsibilities to be assigned to the beneficiary fall within the duties of a registered nurse. In the *Occupational Outlook Handbook* (*Handbook*), 2008-09 edition, the Department of Labor describes, in part, the duties of a registered nurse:

> Registered nurses (RNs), regardless of specialty or work setting, treat patients, educate patients and the public about various medical conditions, and provide advice and emotional support to patients' family members. RNs record patients' medical histories and symptoms, help perform diagnostic tests and analyze results, operate medical machinery, administer treatment and medications, and help with patient follow-up and rehabilitation.
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> RNs teach patients and their families how to manage their illness or injury, explaining post-treatment home care needs; diet, nutrition, and exercise programs; and self-administration of medication and physical therapy. Some RNs work to promote general health by educating the public on warning signs and symptoms of disease. RNs also might run general health screening or immunization clinics, blood drives, and public seminars on various conditions.
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> When caring for patients, RNs establish a plan of care or contribute to an existing plan. Plans may include numerous activities, such as administering medication, including careful checking of dosages and avoiding interactions; starting, maintaining, and discontinuing intravenous (IV) lines for fluid, medication, blood, and blood products; administering therapies and treatments; observing the patient and recording those observations; and consulting with physicians and other health care clinicians. Some RNs provide direction to licensed practical nurses and nursing aids regarding patient care. RNs with advanced educational preparation and training may perform diagnostic and therapeutic procedures

and may have prescriptive authority.

A review of the *Handbook* finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a registered nurse.

> The three major educational paths to registered nursing are a bachelor's degree, an associate degree, and a diploma from an approved nursing program. Nurses most commonly enter the occupation by completing an associate degree or bachelor's program. Individuals then must complete a national licensing examination in order to obtain a nursing license. Further training or education can qualify nurses to work in specialty areas, and may help improve advancement opportunities.

On November 27, 2002, CIS issued a policy memorandum on H-1B nurse petitions (nurse memo) and acknowledged that an increasing number of nursing specialties, such as critical care and operating room care, require a higher degree of knowledge and skill than a typical RN or staff nurse position.[1] As stated in the nurse memo, certification examinations are available to registered nurses who work in such specialties and possess additional clinical experience, but who are not advanced practice nurses. The mere fact, however, that a nursing position has a title such as "critical care," "emergency room," or "pediatrics," does not necessarily mean that the position qualifies as a specialty occupation.

The AAO looks beyond the title of the position and determines, from a review of the position's duties and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. While the nurse memo specifically states that a petitioner may be able to demonstrate, through affidavits from independent experts or other means, that the nature of the position's duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's of higher degree (or its equivalent), CIS maintains discretion to use as advisory opinions statements submitted as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The AAO must be satisfied that the ultimate employment of the alien is in a specialty occupation, regardless of the position's title. Here, the duties of the position, as described by the petitioner, do not entail any specialized or complex responsibilities that involve the theoretical and practical application of a body of highly specialized knowledge. The duties ascribed to the offered position are routine to many registered nurse positions. The petitioner asserts that the duties to be performed by the beneficiary in this instance as a "BSN Staff Nurse 1," contain duties that a "Staff Nurse 1" or "Staff Nurse 2" cannot perform because those positions do not require a bachelor's degree. A review of the position descriptions, however, does not confirm this assertion. Both position descriptions detail duties regularly performed in the industry by registered nurses who do not possess a baccalaureate level education. The petitioner has not established, and does not assert, that any of its registered nurses are restricted from

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[1] Memorandum from Johnny N. Williams, Executive Associate Commissioner, INS Office of Field Operations, *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses*, HQISD 70/6.2.8-P (November 27, 2002).

treating patients or performing nursing tasks based upon their level of education. CIS cannot find, based upon the current record, that the job fits the criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

The petitioner has also failed to establish that the proffered position meets any of the remaining three criteria for qualification of the position as a specialty occupation. Any of the three career paths noted above are sufficient for the beneficiary to perform the duties associated with the offered position. There is no requirement that a nurse have a baccalaureate or higher degree, or its equivalent, for entry into the position. Finally, the petitioner states that a bachelor's degree is required because the proffered position requires supervision of less experienced staff. The job description provided by the petitioner (Exhibit C attached to counsel's letter of March 19, 2007) contains no supervisory responsibilities. Further, it has not been established that supervisory responsibilities would require the theoretical and practical application of a body of highly specialized knowledge. Many nurses advance to supervisory positions without a baccalaureate level education. The petitioner has not established compliance with 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

The petitioner has not shown that a degree requirement is common to the industry in parallel positions among similar organizations, and offers no evidence in this regard. Nor has the petitioner established that the duties of the position are so complex or unique that they can be performed only by an individual with a baccalaureate level education in a specific specialty. As previously noted, the duties ascribed to the offered position are routine to many registered nurse positions. Thus, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The petitioner has not established that it normally requires a bachelor's degree or its equivalent for the proffered position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*). To determine whether a proffered position may be established as a specialty occupation under the third criterion – the employer normally requires a degree or its equivalent for the position – the AAO usually reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. The record is insufficient in this regard. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees.

Finally, the petitioner states that CIS has determined that the offered position qualifies as a specialty occupation because the position is identical, or similar, to positions previously approved for H-1B status. This reference will not sustain the petitioner's burden of establishing H-1B qualification in the petition now before the AAO. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, the AAO is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). It warrants noting that Congress

intended this visa classification for aliens that are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge. Congress specifically stated that such an occupation would require, as a *minimum* qualification, a baccalaureate or higher degree in the specialty. In the present matter, the petitioner has offered the beneficiary a position as a registered nurse. For the reasons discussed above, the proffered position does not require attainment of a baccalaureate or higher degree in a specific specialty as a minimum for entry into the occupation, and approval of a petition for another beneficiary based on identical facts would constitute material error and a violation of 8 C.F.R. § 214.2 paragraph (h).

Beyond the decision of the director, the record does not establish that the beneficiary is qualified to work as a registered nurse in the State of New York because she has not satisfied applicable licensing requirements.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

(A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

(B) completion of the degree described in paragraph (1)(B) for the occupation, or

(C) (i) experience in the specialty equivalent to the completion of such degree, and

(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Counsel states in her July 12, 2007 response to the director's request for evidence that the beneficiary could not obtain a New York nursing license until she was physically present in the United States and "sits for the New York State nursing examination in New York." A license is required to work as a registered nurse in New York. Thus, the beneficiary is not qualified to perform the duties of the proffered position. The petitioner did not present evidence from New York licensing authorities indicating that the beneficiary would be able to immediately begin working upon arrival in the country under a limited permit or some other administrative provision whereby the beneficiary could work as a nurse pending the completion of licensing requirements. For this additional reason, the petition must be denied.

The proffered position does not meet any of the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the director's denial of the I-129 petition shall not be disturbed.

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 failed to sustain that burden and the appeal shall accordingly be dismissed.

ORDER: The appeal is dismissed. The petition is denied.