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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
200 AAO, 20 MASS, 3/F
425 I Street, N.W.
Washington, DC 20536



NOV 07 2003

File: EAC 01 256 53025 Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner:
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:



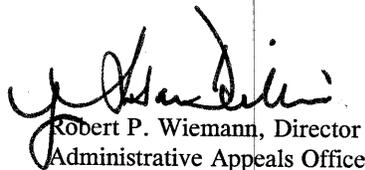
INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Arverne, New York rehabilitation center and nursing home with 13 employees and a gross annual income of \$1,200,000. It seeks to employ the beneficiary as a specialty registered nurse for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation. On appeal, counsel asserts that the proffered position is a specialty occupation, because the requirement that specialty nurses hold a bachelor of science degree in nursing (BSN) is an industry standard.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184 (i)(1), 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 defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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;
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 is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The issue in this proceeding is whether the petitioner has established that the proffered position is a specialty occupation. In the original petition received by the Vermont Service Center on August 28, 2001, the petitioner described the duties of the proffered position as follows:

- Administering appropriate medical treatment and therapies to specialty patients with concentration on hemodialysis, peritoneal dialysis, treatment of end stage renal disease, I.V. therapy, tracheostomy care and respiratory care;
- Reading and interpreting medical charts;
- Reviewing patient progress with medical personnel; [and]
- Implementation of [sic] physician's instructions relating to various medical treatments.

On November 5, 2001, the director requested further evidence that the offered position is a specialty occupation. In response, counsel submitted a citation from the Department of Labor's *Occupational Outlook Handbook (Handbook)*, a description of the job duties of staff nurses and charge nurses, and the New York State educational requirements for registered nurse positions.

On March 19, 2002, the director denied the petition. The director noted that there is no industry standard requiring nurses to hold a Bachelor of Science degree in nursing (BSN), nor did the record demonstrate that the beneficiary's duties would be so unique that a bachelor's degree is necessary to perform them.

On appeal, counsel asserts that the proffered position requires a bachelor's degree, as evidenced by the *Handbook*, industry standards, and also by the fact that numerous similar petitions had been previously approved. Regarding any prior approvals, 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, Citizenship and Immigration Services (CIS) is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the other petitions were approved in error, no such determination may be made without review of the original record in its entirety. If the other petitions were approved based on

evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the other petitions would have been erroneous. CIS is not required to approve 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). Neither CIS nor any other 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).

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 However, the mere fact that a nursing position has a title such as "critical care" does not necessarily mean that it qualifies as a specialty occupation.²

CIS looks beyond the title of the position and determines, from a review of the duties of the position 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 or 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). CIS must be satisfied that the ultimate employment of the alien is in a specialty occupation, regardless of the position's title.

With respect to counsel's assertion that the *Handbook* demonstrates that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the field of specialty

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).

² It is worth noting that the nurse memo also mentions that certification examinations are available to such registered nurses who may work in such nursing specialties and possess additional clinical experience, but who are not advanced practice nurses.

nursing, it appears that counsel misread the pertinent phrase. The *Handbook* 2002-2003 edition on page 269 examines the educational requirements for registered nurses. The *Handbook* states: "A bachelor's degree is often necessary for administrative positions, and it is a prerequisite for admission to graduate nursing programs in research, consulting, teaching, or a clinical specialization." This means that a bachelor's degree is a prerequisite for admission to graduate nursing programs in a clinical specialization. It does not mean, as counsel implies, that a bachelor's degree is necessary as a prerequisite for clinical specialization.

The proffered position is analogous to that of a registered nurse, whose basic duties are outlined as follows in the *Handbook* on page 268: "(Registered nurses) observe, assess, and record symptoms, reactions, and progress; assist physicians during treatments and examinations; administer medications; and assist in convalescence and rehabilitation." The *Handbook* also indicates that an associate degree in nursing is sufficient to perform the duties of a registered nurse. Accordingly, the evidence does not support a finding that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position. The proffered position thus does not meet the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

With regard to the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), namely that the degree requirement is common to the industry in parallel positions or that the position is so complex or unique that it can be performed only by an individual with a degree, the evidence supports neither prong of this provision. The description of the charge nurse position contained in the record stipulates that the petitioner requires the incumbent to hold a bachelor's degree. The citation from the *Handbook* referred to by the petitioner does not demonstrate that this is a specialty occupation, however, nor does the State of New York require a bachelor's degree for registered nurses.

The record also includes a letter from the Director of Regulatory Compliance for the Greater New York Health Care Facilities Association which indicates that the nursing home industry seeks nurses with bachelor's degrees to handle patients in certain specialty areas. Beyond the generalized statements in this letter, there is no evidence on record to support the contention that "it is and [sic] accepted fact that a Bachelor's degree is generally necessary throughout the Long Term Care Industry. . . ." Moreover, the letter refers to the same erroneous construction of the *Handbook* phrase regarding the requirement that nurses have a bachelor's degree in order to enter into graduate programs in clinical specialties. The letter purports to quote the *Handbook* in stating, "A Bachelor's degree is generally necessary as a prerequisite for clinical specialization." As noted above, this is not the wording or the intention of the *Handbook*. Regarding the second prong of this criterion, the record contains no evidence that the position is

so complex or unique that it can be performed only by an individual with a bachelor's degree.

With regard to the third criterion at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(3), the record contains statements that the petitioner's currently employed nurses have bachelor's degrees, but there is no evidence to support this. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without more compelling evidence, the petitioner has not established that it normally requires a degree or its equivalent for the specific position in question.

With respect to the final criterion of 8 C.F.R. § 214.2 (h)(4)(iii)(A), namely that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree, the description provided by the petitioner of the beneficiary's work duties does not document that the duties of the proffered position are any more specialized or complex than the duties of any other registered nurse. Here, although the proffered position has the title of "specialty registered nurse," the duties of the position do not entail any specialized or complex responsibilities that involve the theoretical and practical application of a body of highly specialized knowledge. As previously stated, the duties ascribed to the position, which include administering appropriate medical treatments, reading and interpreting medical charts, and developing nurse care plans, are routine to many registered nurse positions. Just because the beneficiary would perform these duties with dialysis patients does not elevate the duties' complexity. As the record is presently constituted, CIS cannot find that the job fits the criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that any of the four criteria enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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 sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.