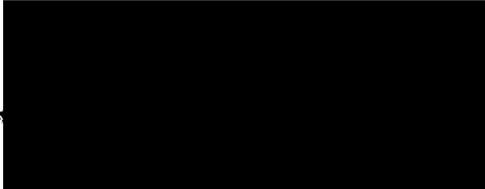




U.S. Citizenship
and Immigration
Services

D-2



FILE: EAC 02 164 52131 Office: VERMONT SERVICE CENTER

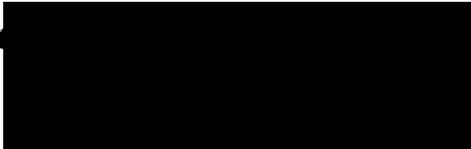
Date: AUG 14 2004

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 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.

Maui Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. 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 hospital that seeks to employ the beneficiary as an emergency room nurse. The petitioner, therefore, 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 is not a specialty occupation. On appeal, counsel submits a brief with additional documentary evidence.

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.

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.

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) Form I-129 and supporting documentation; (2) the director's request for additional evidence, dated November 18, 2002; (3) the petitioner's response to the director's request, dated February 5, 2003; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an emergency room registered nurse. Evidence of the

beneficiary's duties includes: the Form I-129; an employment agreement between the petitioner, the beneficiary and an employment agency; the petitioner's letter of support dated March 13, 2002; and counsel's response to the director's request for evidence. With regard to this evidence, the employment agreement does not indicate any specific job responsibilities, while the letter of support stated that the beneficiary would spend virtually all of her time in a surgical intensive care unit. The remainder of the evidence indicated that the beneficiary would spend the majority of her time in the petitioner's emergency room facilities. With regard to emergency room duties, the beneficiary would be responsible for caring for patients who come to the medical facility in very serious condition, suffering from any type of injury or disease, sane or lacking in senses, passive or violent. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in nursing (BSN).

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director further noted that the petitioner had not established that the beneficiary possessed the necessary licensure to practice nursing in the State of Pennsylvania. With regard to the I-797 Approval Notices provided by counsel with regard to other nursing positions, the director cited *Matter of Khan*, 14 I&N Dec. 397 (BIA 1973), as rationale for why the instant petition did not have to be approved.

On appeal, counsel states that the director ignored the contents of a CIS memo issued in November 2002 that addressed categories of registered nurses that may be H-1B eligible. Counsel further asserts that the beneficiary cannot take and pass the licensing examination for nurses until she enters the United States. He further states that the State of Pennsylvania does not have a limited permit and that the requirement of full licensure is normally waived by the U.S. Consul in the Philippines. Counsel also states that the director's reference to *Matter of Khan* is not appropriate as the case findings concern deportation issues based on a faulty admission into the United States and not on prior approvals of similar petitions. Counsel resubmits three letters submitted previously by three physicians. Finally, counsel alleges that CIS approves H-1B classification for beneficiaries seeking registered nurse positions in the state of North Dakota, while discriminatorily denying this classification to beneficiaries seeking registered nurse positions in the state of Pennsylvania. Counsel alleges that because an RN position in the two states has essentially the same specialized and complex duties, the RN positions in both states should be considered specialty occupations.

With regard to counsel's final allegation, this statement is not persuasive. According to the nurse memo, the National Council on State Boards of Nursing (NCSBN) had previously confirmed that the state of North Dakota was the only state that required that an individual possess a bachelor of science in nursing (BSN) in order to be licensed as a registered nurse in that state. According to the nursing memo, in a situation in which the BSN is a prerequisite to practicing in the field, the position will qualify as an H-1B position. While the nurse memo specifically provided "a petition for an RN position in the state of North Dakota will generally qualify as an H-1B position due to the degree requirement for licensure," effective August 1, 2003, the state of North Dakota no longer requires a BSN for licensure by examination. The state is now required to "adopt rules establishing standards for the approval of out-of-state nursing education programs," which may include non-BSN nursing education. Section 43-12.1-09 of the North Dakota Nurse Practices Act. Accordingly, a position for a registered nurse within the state of North Dakota is no longer automatically considered an H-1B position because the degree requirement no longer exists. Counsel's argument is moot.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria include: whether the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. With regard to the proffered position, it is a nursing position within the petitioner's emergency room operation. With regard to the minimum requirement for entry into the nursing field, the *Handbook* states the following about the training and educational requirements for registered nurse positions:

There are three major educational paths to registered nursing: associate degree in nursing (A.D.N.), bachelor of science degree in nursing (B.S.N.), and diploma. . . . Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses.

....

. . . [S]ome career paths are open only to nurses with bachelor's or advanced degrees. 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.

Counsel states that the position is beyond the entry-level staff or registered nurse position. With regard to the duties of the proffered position as described by counsel, these duties appear to be generic. The record is not clear as to why a graduate of a two-year associate degree in nursing with nursing experience beyond entry-level skills could not perform the duties of the position. With regard to counsel's assertion that the position is beyond that of entry-level registered or staff nurses, on November 27, 2002, CIS issued a policy memorandum on H-1B nurse petitions (nurse memo)¹. On page two, the memo refers to certified advanced practice registered nurses (APRNs) and contrasts the educational requirements for APRNs with those of general registered nurse positions. The policy memo also acknowledges that an increasing number of nursing

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).

specialties, such as critical care and operation room care, require a higher degree of knowledge and skill than a typical RN or staff nurse position.

With regard to these non-APRN nurses working in specialty areas, the memo states that certification examinations are available to registered nurses who are not advanced practice nurses, but who may possess additional clinical experience. Areas such as rehabilitation nursing, and critical care nursing are mentioned. *Id* at 3. To date the petitioner has not indicated any need for certification examinations in a specific area for the proffered position. The record is not sufficient to establish that the proffered position would fall under the general guidance provided in the nurse memo with regard to positions employing non-APRN nurses that may be H-1B eligible. Therefore, the petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. With regard to parallel positions, in the original petition, counsel submitted 35 I-797 Approval Notices for H-1B visa petitions. Counsel asserted that CIS had already determined that the proffered position is a specialty occupation since CIS had previously approved the submitted petitions. Counsel identified the approval notices as being for nursing areas, such as critical care, step-down units, and intensive care. This record of proceeding does not, however, contain all of the supporting evidence submitted to the Vermont Service Center in the prior cases. In the absence of all of the corroborating evidence contained in those records of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the other H-1B petitions were approved in error.

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, 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 prior approvals were granted in error, no such determination may be made without review of the original records in their entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in the record of proceeding that is now before the AAO, however, the approval of the prior petition 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).

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 nonimmigrant 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). With regard to counsel's assertion with regard to the findings in *Matter of Khan*, it is noted that the findings of the three decisions cited above appear to be more analogous to the instant petition than *Matter of Khan*.

Counsel also submitted materials from the U.S. Department of Veteran Affairs (VA) on its revised academic credentials for registered nurse employees, and it submitted a press release from the American Association of

Colleges of Nurses (AACN) with regard to its collaboration with the VA on the revised academic credentials program. As the director correctly noted, the educational requirements formulated by the Department of Veterans Affairs do not necessarily represent the industry standard in the field of nursing. It should also be noted that other associations such as the American Nursing Association (ANA) support a change in the nursing industry that would require a bachelor of science degree in nursing as the minimum credential for an entry-level position. However, the reality is, at the present time, neither the ANA nor any other nursing association has made such a degree a minimum requirement. A nurse with an associate's degree can still work as a nurse, can join the ANA, and can have the ANA represent her/his interests. Thus, neither the materials from the VA and the AACN constitute evidence from professional associations regarding an industry standard for the field of nursing.

In addition, counsel provided letters from three physicians, two of which hold or have held medical or board positions with the petitioner. The three physicians stated that positions, such as emergency room nurses, required more education than other nursing positions. However, the letter writers do not provide any specific information about the proffered position and all three letters contained the same generic language. As such, these letters are also not viewed as establishing an industry standard. Without more persuasive evidence, the petitioner has not established the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. Neither counsel nor the petitioner provided any documentation as to the academic credentials of nursing personnel previously or currently employed in its emergency room facilities. Therefore the petitioner cannot meet this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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 nurse memo, mentioned previously in the instant petition, refers to positions beyond entry-level nursing position that may be H-1B eligible. The memo states that petitioners through affidavits from independent experts or other means could demonstrate that the nature of these positions' 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).

To date, the evidence placed on the record with regard to the job duties of the proffered position does not support further analysis of the instant petition based on the nurse memo. For example, the petitioner's description of the job duties was generic. In addition, none of the three physician letters provided by the petitioner actually addressed the nature of the duties to be performed by the beneficiary within the petitioner's emergency room operation. The contents of all three letters, with the exception of the discussion of the letter writers' affiliations with the petitioner, are identical. While all three physicians are experts in their medical fields, and are clearly qualified to provide their opinions on the need for more education or training in certain nursing fields, their letters were insufficient to establish that the proffered position is a specialty occupation, as discussed in the nurse memo. Without more persuasive evidence, the petitioner has not established this criterion.

With regard to the licensure issue raised by the director, the petitioner did not establish that the beneficiary is qualified to perform the duties of the position. With regard to licensure, 8 C.F.R. 214.2(h)(4)(v) states the following:

(A) *General.* If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

(B) *Temporary licensure.* If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

(C) *Duties without licensure.* In certain occupations which generally require licensure, a state may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, the director shall examine the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

Counsel asserted that the State of Pennsylvania does not allow the NCLEX test to be taken outside the state, and that the U.S. Department of State routinely provides a waiver for Philippine nurses to enter the United States to take the NCLEX examination. Counsel also stated that the State of Pennsylvania had utilized the services of the Commission on Graduates of Foreign Nursing Schools (CGFNS) to evaluate the credentials of its applicants for purposes of the issuance of limited permits to be used by registered nurses prior to receiving their permanent licensure. Although counsel stated that it had submitted documentary information from CGFNS, no such documentation is found in the record. The record also does not contain any official correspondence from the Department of State, the State of Pennsylvania licensing authorities, CGFNS or NCLEX to further substantiate any of counsel's assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Without more persuasive evidence, the petitioner has not provided sufficient information to resolve the question of the beneficiary's required nursing license.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation, or that the beneficiary is qualified to perform the duties of the proffered position. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.

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