



U.S. Citizenship
and Immigration
Services

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FILE: EAC 02 165 50486 Office: VERMONT SERVICE CENTER Date: AUG 04 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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.

Mari 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 a registered nurse in its critical care unit. 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, and the beneficiary was not qualified to perform the duties of the position. On appeal, counsel resubmits three pieces of correspondence and submits 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 6, 2002; (3) the petitioner's response to the director's request, dated January 28, 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 a registered nurse in its critical care unit. 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 critical care unit. With regard to her critical care unit duties, the beneficiary would be responsible for caring for patients who have had major medical problems from disease or accident, including all types of neurosurgery, trauma, thoracic, vascular, major gastrointestinal and other complicated surgery, or who are complicated post surgical patients. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in nursing (BSN) or its equivalent.

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). Citing the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the director found that the duties of the proffered position resemble those performed by a registered nurse in a hospital. The director stated that employers generally do not require a bachelor's degree for a registered nurse position, and that the nursing industry distinguishes only registered nurses from advanced practice nurses. The director delineated statistics about the percentage of registered nurses, hospital nurses, nurse supervisors, and head nurses holding associate degrees as documented in a study by the U.S. Department of Health and Human Services, Bureau of Health Professions. According to the director, the submitted evidence did not establish that the petitioner normally requires a bachelor's degree for the position. Finally, the director noted that the beneficiary is not qualified to perform the duties of the proffered position.

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 claims 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.

This allegation 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 is 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 nurse 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 position 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 critical care unit operations. 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 stated that the position is beyond the entry-level staff nursing position and references a CIS memo on nurses to further support his description of the position. 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 36 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 petitions were 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 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).

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).

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 VA's revised academic

credentials program. However, 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 whom hold or have held medical or board of director positions with the petitioner. The three physicians stated that positions such as intensive care nurses required more education than other nursing positions. However, the letter writers do not provide any specific information about the proffered position and the 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 critical care units. On appeal, counsel asserts that the other ICU registered nurses are all baccalaureate-educated nurses or the equivalent. However, he provides no documentation to further substantiate this assertion. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In addition, educational equivalency is considered by CIS when a specific degree does not exist in an occupational field. *Tapis Int'l vs. INS*, 94 F.Supp. 2d 172 (D. Mass. 2000). As discussed, the *Handbook* explains that there are degree programs specifically related to nursing. In addition, as the director has already stated, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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.² 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 a non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. Therefore the petitioner has not met this criterion.

² The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

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 this CIS policy guidance. For example, the job duties as outlined by counsel appear to be 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 critical care unit 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.

Furthermore, the article from the *JAMA* and the information submitted about degreed nursing programs are irrelevant in establishing that the proffered position requires a bachelor's degree in nursing based on the specialized or complex nature of the duties. First, the *JAMA* article merely discusses improving the nurse to patient ratio. Second, the IU Northwest School of Nursing Program's philosophy statement seems nearly identical for the associate of science and a bachelor of science degrees. The associate of science program prepares its graduates "with the knowledge and skills to provide direct care to individuals within the family and community context." Graduates are a "competent provider of nursing care, a conscientious practitioner who practices within the legal and ethical parameters of nursing, and an accountable/responsible manager of care." Similarly, the bachelor of science graduate is "capable of practicing in a competing and responsible fashion as informed citizens in a dynamic and diverse society." According to the philosophy statement, the baccalaureate nursing education merely provides a "broad foundation in the sciences and liberal arts necessary for preparing professional nurses who are capable of practicing in a competent and responsible fashion as informed citizens in a dynamic and diverse society." Without more persuasive evidence, the petitioner has not established that the nature of the duties of the proffered position are so complex and specialized that they can only be performed by an individual with a baccalaureate degree in a specific specialty. Thus, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

We note that counsel also claims that CIS is requiring that the petitioner establish all four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director's denial letter considered the evidence in the record and the duties of the proffered position to determine whether the petitioner satisfied any one of the four criteria. No language in the denial letter indicates that the director required that the petitioner establish all four criteria. Accordingly, the petitioner has failed to establish that the proffered position is a specialty occupation.

The director also found that the beneficiary is not qualified to perform the duties of the proffered position. The AAO concurs with this finding.

According to the *Handbook*, all States and the District of Columbia require that students graduate from an approved nursing program and pass a national licensing examination.

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 full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. Pursuant to 8 C.F.R. § 214.2(h)(4)(v)(A), if an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien seeking H classification in that occupation must have that license prior to the approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

No evidence in the record indicates that the beneficiary possesses a license to practice as a registered nurse or has passed a national licensing examination. Counsel asserted, in the original petition, 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 provided 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.

A May 4, 1992 memorandum issued by the Acting Assistant Commissioner stated that the intent of the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A) is not to deny petitions where a license is required *solely* because the beneficiary did not possess the required physical presence in the United States necessary to obtain licensure.³ CIS will approve initial H-1B petitions where the alien is otherwise qualified but lack of physical presence in the United States is the sole bar to obtaining temporary licensure. However, the petitioner must submit an official statement from the licensing authority which clearly indicates that the alien is eligible for temporary licensure and that the license can be obtained immediately upon entering the United States and, if required, registering for the state's next licensing examination and paying the appropriate fee.

The record also does not contain any official correspondence from the state of Pennsylvania licensing authorities, CGFNS, or NCLEX to further substantiate any of counsel's assertions with regard to licensure. 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 with regard to the question of licensure, the AAO finds that the beneficiary does not qualify to perform the duties of the proffered position.

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.

³ Memorandum from Lawrence J. Weinig, Acting Assistant Commissioner, INS Office of Adjudications (COADN), *Temporary Licensure for H-1B Nonimmigrants*, CO 214h-C (May 4, 1992).

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