U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

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U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: EAC 03 094 53274 Office: VERMONT SERVICE CENTER Date: AUG 05 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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 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 nursing home that seeks to employ the beneficiary as a nurse supervisor. In order to employ the beneficiary, the petitioner endeavors to classify her 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 on the basis that the petitioner did not establish that the proffered position is a specialty occupation. The director also found that the petitioner had failed to establish that the beneficiary possessed nurse licensure credentials that would qualify her to perform the duties of the proffered position.

Counsel asserts that the appeal "is tendered on the grounds" that the director's decision to deny the petition was "arbitrary, capricious, and against the weight of the evidence." Counsel also asserts that the denial "amount[s] to dereliction of duty in violation of the law." Counsel contends that the director erred because the evidence establishes that the proffered position is a specialty occupation and that the beneficiary's licensure status would not hinder her ability to perform the proposed duties. Counsel also contends that the director erred because he did not consider as part of the instant record a set of documents that counsel had submitted simultaneously with replies to requests for additional evidence (RFEs) in the instant proceeding and in several others involving this petitioner and other nurse supervisor positions at its nursing home.

The AAO has determined that the director's decision to deny the petition was correct. The AAO reached this determination on the basis of the entire record of proceeding before it. This includes: (1) the petitioner's Form I-129 and supporting documentation filed with it; (2) the director's RFE; (3) the letter that counsel submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief. It should be noted that the record before the AAO does not include any of the petitioning entity's documents which counsel did not submit directly into the record of this particular proceeding. This means that the AAO did not consider any of the documents cited in counsel's letter of reply to the RFE or in his brief on appeal, except for those which counsel had submitted directly into the record at earlier stages of the proceeding or those that form the basis of CIS policy. [1]

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[1] Of the documents listed as exhibits in counsel's RFE reply but not submitted into the record with that reply, the following were nevertheless considered by the AAO because counsel had earlier submitted them into the record with the Form I-129: (1) the information from the American Association of Colleges of Nursing (AACN) on the baccalaureate degree in nursing; (2) the New York State requirements for nursing licensure and limited permits; (3) an organizational chart; and (4) diplomas of the petitioner's current nurse supervisors. The AAO also considered its own policy memo, 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) (hereinafter referred to as the CIS nursing memo), and the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* pages listed in the in the RFE reply, because the AAO routinely considers the *Handbook's* information, whether or not the petitioner provides copies.

The proper extent of the documentary record is the first issue that was considered on appeal, and, as discussed below, the AAO determined that the director acted correctly in not considering the exhibits for which counsel had not provided a separate copy for entry into this specific record of proceeding.

The documents in question are those which the last page of counsel's letter of reply to the RFE listed as Exhibits A to X. That these documents were not part of the record considered by the director is evident in this excerpt from page 3 of the director's decision:

> It is noted that this Bureau specifically requested, inter alia, an organizational chart for the petitioning firm and documentation characterizing the subordinate employees who will be reporting to the beneficiary. The petitioner's response consisted exclusively of counsel's arguments. Although counsel refers this Bureau to "Exhibits A through X." [sic] No such exhibits were found to be included in the petitioner's response.

The "Procedural Background" section of counsel's brief (at pages 3-6) includes the following information about why the RFE reply in the record of this proceeding does not include copies of the exhibits that it references. On February 4, 2003, the petitioner filed the instant visa petition along with nine other H-1B petitions for nurse supervisor positions at its healthcare facility. Thereafter, the service center issued an RFE regarding each petition: six RFEs, including the one on the instant petition, were issued on February 12, 2003; three were issued on February 14, 2003; and one on February 18, 2003. Counsel forwarded his replies to the RFEs "in the same groupings in which the RFE's were issued." For each RFE, counsel sent a separate letter of reply that was tailored to that specific RFE. However, for each grouping of RFE replies, counsel appended only one copy of the exhibits that he intended to be considered as part of all the RFE replies in that grouping:

> Instant counsel forwarded replies to the RFEs in the same groupings in which the RFEs issued. [Footnote deleted.] The responses to the three types of RFEs were altered where it was required, though [they were] virtually identical[,] as the RFEs questioned and required the same evidence. For each petition, a complete response was prepared and sent to VSC [the Vermont Service Center]. Each RFE response bore a caption that clearly indicated that it was responsive to more than a single petition. On each response, a different EAC number [file number] was highlighted to indicate that each petition had a separate (albeit identical) response. However, in light of the fact that the compiled additional evidence numbered greater than five hundred (500) pages in length (even with two hundred or [sic] pages being double-sided), only one set of exhibits was prepared for each batch. . . . [Brief, at page 4.]

Counsel asserts that, after the first set was dispatched, one of its clerks (unnamed by counsel) notified a service center officer (also unnamed) of the inclusion of only one set of exhibits per "batch":

> . . . In addition to the cover letters that clearly stated the multiplicity of responses and the shared exhibits, a clerk of this office called the Premium Processing Unit of the VSC after the first batch was dispatched to advise the VSC verbally that while each petition had a separate response as indicated by highlight, they shared one set of Exhibits. Thus, in response to the

> six RFEs dated 2/12/2003, six full responses and one set of Exhibits was sent. The same is true for the RFEs dated 2/14/2003 which involved three beneficiaries. The Officer with whom the clerk spoke thanked the clerk for alerting the unit to the multiplicity. Asked if each response should be accompanied with a complete set of exhibits, the Officer stated that neither the unit nor this office needed to be burdened so long as the cover and response clearly indicated the fact that the exhibits were shared. Trusting that response and continuing to indicate the nature of the situation, this office completed all of the responses to the ten petitions in the manner just described.

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 before it. *See* 8 C.F.R. § 103.2(b)(16)(ii). Furthermore, CIS regulations contain no provision assigning CIS the authority or the responsibility to augment a record of proceeding for a petitioner by photocopying or otherwise reproducing documents for the petitioner and then entering those documents into other records of proceeding on the petitioner's behalf. The fact that the documents had been entered into another record of proceeding involving the instant petitioner and the same type of position as here makes no difference. Accordingly, the director properly based his decision upon a record that did not include documents that counsel referenced but did not provide.

It is also noted that, although the director's decision put counsel on notice that CIS had not reproduced and entered documents from another proceeding into this record, counsel has further chosen not to submit those documents into the record at the appellate stage. As the record reflects that counsel was accorded the full amount of time required by regulation to submit matters on appeal, the record is now complete. Because the AAO is limited to reviewing the record before it, those referenced documents are outside its scope of review.

Next, for the reasons explained below, the AAO found that the petitioner has not established that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

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.

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 petitioner maintains 240 certified beds in its nursing home. It specializes in caring for elderly patients with respiratory and other health complications, and most of its residents require round-the-clock medical supervision.

The organizational chart that counsel submitted with the Form I-129 and counsel's comments on the chart (at page 13 of counsel's letter submitted with the Form I-129), indicate the following facts. The healthcare facility has four levels of non-shift employees, which the chart identifies in descending hierarchical order. The Administrator, Assistant Administrator, and DNS (Director of Nursing) are depicted as superior to all other personnel. Below the DNS position, the organizational chart depicts two other non-shift positions – In-Service Coordinator and "MDS Coordinator." According to the chart, these latter positions are on the same organizational level as the Nurse Supervisor positions, one of which is the subject of this proceeding.

For each of the petitioner's three eight-hour shifts, the chart depicts six Nurse Supervisors, each of which is responsible for one of the two patient areas on each floor of the petitioner's facility (that is, section 1, 2, or 3 North or South). Each Nurse Supervisor is in charge of a Head Nurse. Directly below the Head Nurse are For each of the petitioner's three eight-hour shifts, the chart depicts six Nurse Supervisors, each of which is responsible for one of the two patient areas on each floor of the petitioner's facility (that is, section 1, 2, or 3 North or South). Each Nurse Supervisor is in charge of a Head Nurse. Directly below the Head Nurse are Registered Nurses, then Licensed Practical Nurses, and, finally, Certified Nursing Aids.

The following list substantially comports with the information on the duties and responsibilities of the petitioner's nurse supervisor position that counsel's letter of support submitted with the Form I-129 described in paragraph form:

1. Directing the activities of the nursing staff;

2. Planning and coordinating the activities of patient-care units to ensure patient needs are met in accordance with instructions of physician and rehabilitation and health care administrative procedures;

3. Coordinating activities with other patient care units, evaluating nursing activities, and ensuring proper delivery of patient care;

4. Engaging in studies and investigations related to improving nursing care;

5. Resolving nursing problems and interpretations of rehabilitation and health care procedures to ensure patient needs are met;

6. Organizing and participating in educational and training programs for health care staff members;

7. Formulating the budget in conjunction with rehabilitation and health care administrators and other nurse supervisors;

8. Maintaining patient clinical records and patient records on narcotics;

9. Supervising the ordering of equipment, pharmaceutical drugs and supplies;

10. Providing work schedules and assigning duties to nurses and aides and directing emergency assistance;

11. Reviewing and evaluating patient medical records, interviewing personnel and interviewing patients to evaluate effectiveness and quality of medical care; and

12. Supervising personnel engaged in quality assurance review of medical records.

Counsel's letter in response to the RFE (at pages 4, 5) numbered these duties as among the "management aspects" of the proffered position:

1. Directing activities of [the] nursing staff;

2. Planning and coordinating activities of patient care units;

3. Conducting studies and investigations related to improving nursing care;

4. Resolving nursing staff problems;

5. Organizing educational and training programs;

6. Supervising and ordering equipment, pharmaceutical drugs and supplies;

7. Creating work schedules;

8. Assigning duties to nurses and aides;

9. Reviewing and evaluating patient medical records (specifically, reviewing and correcting notes on patient records entered by staff nurses);

10. Interviewing personnel;

11. Interviewing patients to evaluate effectiveness and quality of medical care;

12. Writing evaluations and operations reports;

13. Reviewing medical inventory and requisitioning needed supplies;

14. Attending senior management meetings;

15. Assessing continuing education needs of the staff nurses and plan[ning] in-services and other didactic programs; and

16. Upholding internal and state-mandated protocol.

The evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which assigns specialty occupation status to those positions whose normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty related to the position's duties.

The record includes printouts of nursing licensure information provided on the Internet by the New York State Department of Education's Office of the Professions (NYSDEOP). The section on the educational requirements for licensing as registered nurse ("registered professional nurse" in New York State's parlance) specifies "at least a two-year degree or diploma from a program in general professional nursing," not a bachelor's degree in nursing.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations. In its consideration of the instant proceeding, the AAO consulted the 2002-2003 edition of the *Handbook,* to which counsel referred, and the 2004-2005 edition, and found that there is no substantive difference in the DOL's treatment of the registered nurse occupation.

As described in the record, the duties of the proffered position substantially comport with those of the head nurse or nurse supervisor occupation as described in the 2004-2005 edition of the *Handbook*:

> *Head nurses* or *nurse supervisors* direct nursing activities, primarily in hospitals. They plan work schedules and assign duties to nurses and aides, provide or arrange for training, and visit patients to observe nurses and to ensure that the patients receive proper care. They also may ensure that records are maintained and equipment and supplies are ordered. [Italics in original.]

According to the *Handbook,* there are "three major educational paths to registered nursing," namely, "a bachelor's degree, an associate degree, and a [hospital] diploma." In this regard, the *Handbook* notes:

> There are three major educational paths to registered nursing: a bachelor's of science degree in nursing (BSN), an associate degree in Nursing (ADN), and a diploma. BSN programs, offered by colleges and universities, take about 4 years to complete. In 2002, 678 nursing programs offered degrees at the bachelor's level. ADN programs, offered by community and junior colleges, take about 2 to 3 years to complete. About 700 RN programs in 2002 were at the ADN level. Diploma programs, administered in hospitals, last about 3 years. Only a small and declining number of programs offer diplomas. Generally, licensed graduates of any of the three types of educational programs qualify for entry-level positions as staff nurses.

While the *Handbook* recognizes that a bachelor's degree "is a prerequisite for admission to graduate nursing programs in research, consulting, teaching, or a clinical specialization," it does not state that such degree is a prerequisite for head nurse or nurse supervisor positions.

The AAO has noted that the *Handbook* also recognizes that "a bachelor's degree is often necessary for administrative positions." However, the *Handbook* does not define the scope of "administrative" positions, and it does not identify head nurse or nurse supervisor positions as "administrative." Furthermore, the fact that employers "often require" bachelor's degrees for administrative positions does not mean that they do so as their normal minimum entry requirement.

Counsel referenced the November 27, 2002 CIS nursing memo on H-1B nurse petitions which acknowledged that an increasing number of nursing specialties require a higher degree of knowledge and skill than a typical RN staff nurse position. (See brief, at pages 7-9). Counsel is inaccurate in stating that this memo "directed" that "Nurses in Administrative Positions" would "carry a presumption of H-1B eligibility." The nursing memo never uses the word "presumption," and it does not use the phrase "nurses in administrative positions."

Part C of the memo does state, in part:

> *Nursing Services Administrators* are generally supervisory level nurses who hold an RN, and a graduate degree in nursing or health administration. (*See*, Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook at 75.) [Italics added.]

However, it is clear from the content of the referenced section of the 2002-2003 edition of the *Handbook,* which addresses "Medical and Health Services Managers," that the CIS nursing memo is not speaking about the type of position proffered here. In fact, the *Handbook* page to which the nursing memo refers describes nursing service administrator positions as above and requiring greater education than the type of supervisory nurse position proffered here: "[N]ursing service administrators usually are chosen from among supervisory registered nurses with administrative abilities and a graduate degree in nursing or health services administration."

It is also noted that, citing to the registered nurse section of the *Handbook*, Part C of the nursing memo refers to "an upper level 'nurse manager' in a hospital administration position" as a type of position that may qualify as an H-1B specialty occupation:

> Certain other nursing positions, such as an upper-level "nurse manager" in a hospital administration position, may be H-1B equivalent since administrative positions typically require, and the individual must hold, a bachelor's degree in nursing or health administration. (*See* Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook at 269.)

Counsel (brief, at page 8) has misquoted the above section by leaving out the words "in a hospital administration position." Accordingly, his contention that the proffered position "falls squarely within this category as defined by [the nursing memo]" is based on an incorrect rendition of the specific category which the memo discussed. In addition, the evidence of record does not establish that the proffered position belongs to the category discussed, namely, "an upper level 'nurse manager' in a hospital administration position."

Finally, the Internet printout in the record from the American Association of Colleges of Nursing (AACN), entitled "Your Nursing Career: A Look at the Facts," has no significant probative value. It is a promotional document drafted to advocate to prospective nursing students the relative merits of the bachelor's degree programs that its member institutions provide. As such, it does not provide an adequate factual basis from which to draw a conclusion about whether the proffered position requires such a degree.

In summary, because the evidence of record fails to establish that the proffered position is other than that of a supervisory or head nurse position not requiring at least a bachelor's degree or the equivalent in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Next, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). That is, the evidence does not establish that at least a bachelor's degree in a specific specialty is a common requirement in the industry in positions that are both parallel to the one proffered and found among organizations similar to the petitioner.

The AAO discounted counsel's undocumented and unsubstantiated statement that, in requiring a bachelor's degree in nursing, the petitioner is "[l]ike the majority of other hospitals and health care facilities" (brief, at pages 16, 17).

Factors often considered by CIS when determining the industry standard include: whether the *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." *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)).

As discussed earlier in this decision, the evidence does not establish that the proffered position is a type of nursing position for which the *Handbook* indicates an industry-wide requirement for at least a bachelor's

degree in nursing or in any other specific specialty. Also, the record does not include any submissions from firms or individuals in the industry attesting that they routinely employ and recruit only persons with at least a bachelor's degree in nursing.

The AAO accorded no significant evidentiary weight to the job posting documents, submitted with the Form I-129, that are from eight different health care firms in the New York metropolitan area.[2] These documents are too few to establish an industry-wide standard. Aside from this critical fact, accepting the baccalaureate requirement stated in these postings as the industry-wide standard would be inconsistent with the *Handbook's* information. The evidentiary value of the posting documents are also diminished by the facts that the record contains no information as to when, where, and how often the job postings were actually posted or how representative they are of the usual course of recruiting and hiring of the facilities that presented them. It has also been noted that all eight of the documents are virtually identical, aside from differing letterheads and some variance in the offered salaries. This suggests that these postings are not randomly representational but have been selected from an insular group of healthcare facilities. In this regard, it has also been noted that the petitioner's brochure refers to one of the job-posting facilities as "its sister facility." CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The AAO also found that the evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), that is, as one that is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. The record contains no persuasive evidence that the proffered position is unique from or substantially more complex than nursing supervisor positions in hospitals that that do not require a bachelor's degree in nursing.

Next, petitioner has not met the specialty occupation criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) for employers who establish that they normally require a specialty occupation degree or the equivalent for the position in question.

To qualify a position under this standard, a petitioner must first demonstrate that it has a substantial history of requiring at least a bachelor's degree in a specific specialty. In addition, the petitioner must establish that its degree requirement is compelled by the position's performance demands. A 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

[2] The AAO has not considered the other postings to which counsel refers, because they are not in the record.

occupation as required by the Act.[3] 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 a menial, 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.

Counsel asserts that the petitioner "has a strict Bachelor of Science in Nursing degree requirement for the position of Nurse Supervisor" (brief, at page 18) and that this requirement "is neither artificial nor perfunctory" (brief at page 16.) However, counsel's assertions are not supported by substantial evidence in the record.

According to the brochure submitted with the Form I-129, the nursing home has been doing business since 1971, and according to the organizational chart, there are eighteen (18) nurse supervisor positions (six for each of the three twelve shifts). However, the record only contains documentation regarding six employees, all of whom counsel identifies as current nurse supervisors. No documentation is provided with regard to any of the prior employees, and so it is not possible to determine the petitioner's usual recruiting and hiring requirements. Furthermore, for three of these six persons the educational documents consist only of copies of foreign baccalaureate diplomas without any evidence that they had been evaluated as equivalent to U.S. baccalaureate degrees. This evidence is insufficient to establish that the petitioner has normally required at least a baccalaureate degree in nursing for its nurse supervisor positions. In addition, the petitioner has not established that the U.S. baccalaureate degrees in nursing degrees held by three nurse supervisors were necessitated by the job-performance demands of the position.

Finally, the petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), because the evidence of record does not establish that the specific duties are so specialized and complex as to require knowledge usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

Counsel's discussion of the difference between associate and baccalaureate degrees in nursing was not persuasive, for the differences in curricula to which counsel alludes do not establish that the proffered position requires the longer course of studies.

Counsel (brief, at pages 20, 21) is incorrect in referring to the General Educational Development (GED) scale assigned to nursing positions by the DOL's *Dictionary of Occupational Titles (DOT)* as "evidence that [the proffered position] is of a sophisticated nature and requiring at least a Bachelor's Degree." That the GED is not meant to identify the exact level of education or course of study required for any particular occupation is evident from this excerpt from the explanation of the GED scale at the *DOT's* Appendix C (Components of the Definition Trailer):

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[3] 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.

> General Educational Development embraces those aspects of education (formal and informal) which are required of the worker for satisfactory job performance. This is education of a general nature which does not have a recognized, fairly specific occupational objective. Ordinarily, such education is obtained in elementary school, high school, or college. However, it may be obtained from experience and self-study.

Finally, counsel's elaborations on the record, here and elsewhere in his submissions, have no evidentiary impact. As noted earlier, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972), *supra*, and, furthermore, 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), *supra*. Accordingly, the AAO has discounted any assertions of counsel that are not supported by evidence in the record of this proceeding. Counsel's unsubstantiated opinions – such as that non-baccalaureate-degreed nurses are "unqualified for positions that require independent decision making" (brief, at page 19), that "[t]he awareness and autonomy that the Appellant facility requires of its Nurse Supervisors can be found only in nurses with a baccalaureate education" (brief, at page 19), that "[a] strong humanities background is a prerequisite for any profession that deals with people" (brief, at page 20), and that registered nurses with associate degrees in nursing "are not qualified to be Nurse Supervisors unless they have progressive experience equivalent to a Bachelor's degree or higher" (brief, at page 20) – have no weight.

Another such undocumented statement is counsel's assertion (brief, at page 12) that the director's decision "defies the BCIS' traditional practice of granting H-1B classification to management positions due to the fact that administrative positions typically require a bachelor's degree." Counsel does not cite any precedent decisions to support this assertion to the effect that CIS recognizes management positions as a class that merits H-1B classification. While 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Further, the director's decision does not indicate whether he reviewed the other approvals. If the other nonimmigrant petitions were approved based on facts identical to those contained in the current record, the approval would be in violation of paragraph (h) of 8 C.F.R. § 214.2. The AAO is not required to approve applications or 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). It would be absurd to suggest that CIS or any 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).

As the evidence of record does not satisfy any specialty occupation criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

The final issue is whether the director was correct in finding that the petitioner had not established that the beneficiary had licensing credentials that would allow her to perform the duties of the proffered nurse supervisor position. The director described the evidentiary deficiency in these terms:

> Fourthly, the record does not include evidence that the beneficiary is a licensed registered nurse in the state of intended employment [New York] or other evidence that that shows the

> beneficiary is immediately eligible to practice his/her registered nursing in the state of intended employment. Furthermore, it is unclear whether a temporary license or permit would alter the nature of the position and proposed duties. It is unclear how an unlicensed nurse will be performing supervisory duties over registered nurses immediately upon entry into the U.S.

By applying to the facts of record the licensing information in the record's NYSDEOP Internet printouts, it is clear that the beneficiary would have to hold either a New York State license or limited permit to practice as a registered nurse.

Two regulatory provisions are relevant to this licensure issue, namely, 8 C.F.R. §§ 214.2(h)(4)(v)(A) and (B).

The regulation at 8 C.F.R. § 214.2(h)(4)(v)(B) provides that 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.

The evidence of record indicates that the proffered position involves supervisory responsibilities in the area of patients' clinical care (see especially the first five duties outlined in counsel's letter submitted with the Form I-129 (quoted above at pages 5 and 6 of this decision)), and counsel has emphasized the need for decisive independence of action (see, for instance, counsel's references to: the nurse supervisor's "independence and autonomy" (brief, at page 12); "decision-making aspects and leadership responsibilities" (brief, at page 13); "expediently and expertly processing . . . information into a decisive plan of action" (brief, at page 15). In light of these facts and the totality of the evidence, it would appear that the beneficiary would have to have full New York State licensure in order to fully perform the duties described for the proffered position. While the NYSDEOP printout indicates that New York State provides limited permits to practice as a registered nurse, the "Limited Permits" section of the printout indicates that the latitude of action and decision making for persons with limited permits is too circumscribed to allow for full performance of the supervisory functions that are central to the proffered position. The most pertinent part of this printout section reads:

> The Department may issue limited permits, which authorize the practice of licensed practical nursing or registered professional nursing *under the immediate and personal supervision of a licensed, currently registered professional nurse*, with the endorsement of the employer. (Italics added.)

As the evidence of record is insufficient to establish how the beneficiary could fully perform the proposed duties while also complying with New York State's limited permit requirement that she be immediately and personally supervised by a registered nurse, the director was correct in finding that "it is unclear whether a temporary license or permit would alter the nature of the position and proposed duties" and "unclear how an unlicensed nurse will be performing supervisory duties over registered nurses immediately upon entry into the U.S." Accordingly, the director was correct in finding that the petitioner has not provided sufficient evidence

that the beneficiary is qualified to perform the proposed duties with a New York State limited registered nursing permit.

In addition to the temporary licensure provision of 8 C.F.R. § 214.2(h)(4)(v)(B), the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A) provides that, 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. The evidence of record does not establish that the beneficiary either has fulfilled the requirements for either a New York State registered nursing license or limited permit. Thus, the director was correct in determining that "the record does not include evidence that the beneficiary is a licensed registered nurse in the state of intended employment [New York] or other evidence that that shows the beneficiary is immediately eligible to practice his/her registered nursing in the state of intended employment." Accordingly, the petition must also be dismissed on the independent ground that the petitioner has not established that the beneficiary possesses the licensure required to perform registered nursing duties in New York State.

The AAO considered all the errors asserted by counsel throughout his brief, including, but not limited to, the ten assignments of error presented at pages 22-29 of the brief, and found that, alone and in the aggregate, they do not substantiate counsel's position that the appeal should be sustained. The AAO has noted that counsel was correct in noting that that the director's decision failed to reflect that counsel had corrected the petitioner's earlier mistaken information that it employed 30 instead of 300 persons. The AAO also noted that the director's decision overlooks the fact that counsel had submitted into the record an organizational chart with the Form I-129. However, the Administrative Appeals Office is never bound by a decision of a service center or district director. *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). On full and independent review of the entire record of before it, and consideration of all the errors asserted by counsel, the AAO found the director was correct to deny the petition on the specialty occupation and licensure issues, and that that the director was correct in basing his decision solely on the evidence entered into the record of this particular proceeding, without reconstituting the record to conform to evidence entered into the record of a separate proceeding.

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. The petition is denied.