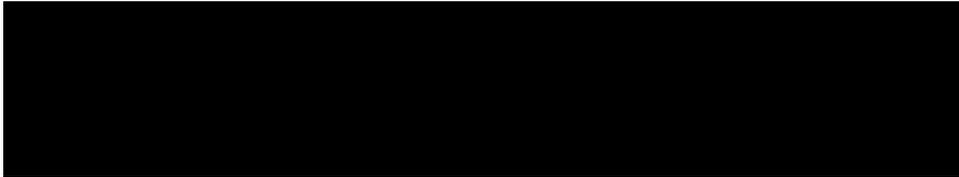




U.S. Citizenship
and Immigration
Services

D2



FILE: EAC 03 094 53160 Office: VERMONT SERVICE CENTER Date: AUG 12 2004

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

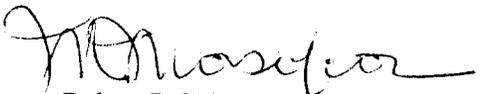
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



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.


Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy

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 him 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 him 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 his ability to perform the proposed duties.

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 the supporting documentation filed with it; (2) the director’s RFE; (3) the letter and exhibits that counsel submitted in response to the RFE; (4) the director’s denial letter; and (5) the Form I-290B and counsel’s brief.

The first matter for discussion is the composition of the record. Counsel’s brief raises an issue about the absence in the record of the documents identified as exhibits A through X of counsel’s reply to the RFE (hereinafter RFE Exhibits). The record before the AAO includes copies of all the aforementioned documents except those described as RFE Exhibits P, Q, S, T, U, W, X and, at V, the I-9 forms and such diploma items as were not earlier submitted into the record.

According to the brief’s procedural narrative (at pages 3-6), counsel submitted an RFE-reply package that consisted of one set of the RFE Exhibit documents along with counsel’s letters of reply to the RFEs on the instant petition and two others for nurse supervisor positions at the petitioner’s nursing home. According to the brief, all three letters addressed the same issues, were substantially the same in content, and listed the single set of RFE Exhibit documents as their Exhibits A through X. Counsel states that the appropriate Citizenship and Immigration Services (CIS) file number was highlighted on each of the three reply letters, so that each reply letter would be matched with the petition to which it related. Counsel indicates that he expected that CIS would consider the single set of exhibits as part of all three RFE replies:

. . . On each response, a different EAC 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. 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 [including the beneficiary here.] 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.

On the above facts, the AAO finds impropriety or abuse of discretion in the director's consideration of the record without the aforementioned documents that were referenced as Exhibits in the RFE reply-letter but not provided in a sufficient number of copies for entry into this and the two other records of proceeding for which counsel intended them. Each nonimmigrant petition is a separate proceeding with a separate record, *see* 8 C.F.R. § 103.8(d), and, in making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding before it, *see* 8 C.F.R. § 103.2(b)(16)(ii). 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 from a record of proceeding on a different petition. Furthermore, the language of the RFE in this proceeding clearly communicated the petitioner's responsibility to submit all responsive documentation in its reply to that particular RFE. See, for instance, the boldfaced and capitalized cautionary note to "RESUBMIT THIS NOTICE AND ALL THE REQUESTED DOCUMENTS AND/OR INFORMATION," and the capitalized instruction (number 3) that "ALL DOCUMENTS REQUESTED SHOULD BE SUBMITTED TOGETHER."

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)(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.

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 Registered Nurses, then Licensed Practical Nurses, and, finally, Certified Nursing Aids.

Counsel’s letter of support submitted with the Form I-129 described the duties and responsibilities of the petitioner’s nurse supervisors in paragraph form. The director’s decision transformed these duties into the following numbered list which contained substantially all the information found in counsel’s paragraphs:

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 directs 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)(I), 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 (at RFE Exhibit N) 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 Department of Labor's (DOL) *Occupational Outlook Handbook (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 excerpted at RFE Exhibit D, and the 2004-2005 edition, and found that there is no substantive difference in the DOL's treatment of the registered nurse occupation in the two editions.

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.¹ (See brief, at pages 7-9; the memo is RFE Exhibit A.) 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.]

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) (hereinafter referred to as the CIS nursing memo).

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 CIS 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.”

The Internet printout from the American Association of Colleges of Nursing (RFE Exhibit B), 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.

Counsel cites no authority for, and the evidence of record contains no evidence that substantiates, his assertion that “[t]he knowledge, skills, and abilities measured by [the petitioner’s evaluation form for its supervisory nurses] are of a sophisticated nature that can be found only in graduates of at least a baccalaureate nursing program or equivalent in nursing experience” (brief, at page 9.) The supervisory nurse evaluation form (RFE Exhibit J) certainly indicates that the petitioner’s nurse supervisors perform administrative and supervisory functions that are beyond the responsibility and authority of general duty nurses. However, it is not self-evident from any information in the supervisory nurse evaluation form that a bachelor’s degree in nursing or the equivalent is necessary to successfully perform the job tasks, customer-service competency requirements, mandatory competencies, and performance characteristics/behavioral expectations that are outlined in the form.

Counsel (brief, at page 28) cites the Department of Health and Human Services 126-page document “The Registered Nurse Population: Findings from the National Sample Survey of Registered Nurses, March 2000” (Survey Findings) (Exhibit E) as support for his contention “that the more educated nurses fill the supervisory ranks.” From this document’s reporting that, in counsel’s words, “only approximately one-third (34%) of the nursing population has earned a Bachelor’s degree or higher,” counsel extrapolates that the survey supports his contention “that the more educated nurses fill the supervisory slots.” Actually, specific findings in the survey are inconsistent with counsel’s contention. The first paragraph at page 27 of the Survey Findings states:

The variation in educational preparation according to position title can be seen from Chart 20 and Table 23 in Appendix A. Those data show that 60 percent or more of those with the position titles of supervisor, staff nurse, and private duty nurse have less than baccalaureate preparation. Whereas more than one-half of nurses employed with other position titles (except head nurse) had baccalaureate preparation or higher. Head nurses were nearly evenly divided between those with less than and those with at least baccalaureate preparation.

The record also includes a letter from an associate hospital administrator of patient care services at the Health Care Services Division at the Health Sciences Center of the Medical Center of Louisiana at New Orleans (RFE Exhibit F). Counsel states that the author “cautioned that the placement of Associate and Diploma Nurses in a supervisory capacity would be endangering people under their care.” If the author had actually characterized Associate and Diploma nurse supervisors as a danger to people under their care, the AAO would have discounted his opinion. Such an opinion would be inconsistent with the evidence in the record that the medical care industry routinely entrusts supervisory nurse and head nurse positions to persons who are associate or diploma registered nurses. However, counsel’s comment is inaccurate. This associate hospital administrator opined only about *newly graduated* associate and diploma nurses. Furthermore, he extended his caution to *all* new nurses, including those with a bachelor’s degree in nursing, as indicated in his stating, “I don’t even think the newly minted BS graduate is ready to tackle supervisory and administrative duties.” Moreover, because this exhibit focuses exclusively on the readiness of nurses to assume administrative and supervisory responsibilities immediately after graduating from a nursing-education program, it is not evidence that a supervisory nurse position requires a bachelor’s degree in nursing. To the contrary, the evidentiary implication of the associate hospital administrator’s cautioning only against employing newly graduated associate degree or diploma nurses is that this witness recognizes that, after some period in the actual practice of nursing, associate degree or diploma nurses should be able to perform as supervisory nurses without endangering patients.

Finally, the opinion offered by the petitioner’s director of nursing (RFE Exhibit H) has little evidentiary value. This employee of the petitioner does not provide a sufficient factual basis to substantiate the validity of her view of the relative values of the different types of nursing degrees. 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).

In summary, because the evidence of record fails to establish that the proffered position is one that normally requires 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 (1) parallel to the one proffered and (2) 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). 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*.

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. 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 is also diminished because 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 been noted that page 2 of the petitioner's brochure refers to one of the job-posting facilities as "its sister facility.")

The AAO also discounted the job vacancy announcements from other employers (collected at RFE Exhibit G). As with the job postings, the number of the advertisements is insufficient to establish an industry-wide hiring practice. Furthermore, on their very face many of the advertised positions appear to be neither parallel to the proffered position nor in organizations that are similar to the petitioner's nursing home, because they

are in hospital acute care practice, such as critical care units like intensive care, emergency response, neo-natal intensive care, and pediatric medical/surgical units.

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 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 occupation as required by the Act.² 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 employees whom counsel identifies as current nurse supervisors. Because documentation is not provided with regard to any of the prior employees, it is not possible to determine the petitioner's usual recruiting and hiring

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.

requirements. Furthermore, for three of these current employees the educational documents in the record consist only of copies of foreign baccalaureate diplomas without any evidence that the degrees which they represent 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 that are held by some of its 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.

The documents about nursing program curricula at various educational institutions that were submitted with the Form I-129 and as RFE Exhibits K and L indicate that there are differences between associate and baccalaureate nursing degrees. However, these differences 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):

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 the opinions 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 unsubstantiated 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 him to perform the duties of the proffered nurse supervisor position. Two sections of the director's decision especially focus on this evidentiary deficiency. The fourth paragraph at page 3 of the decision states:

Moreover, the nature and scope of the position are fundamentally altered, because the petitioner authorizes a "limited period" or unlicensed registered nurse to carry out the proposed duties of and to manage licensed registered nurses. The beneficiary has yet to take and pass the NCLEX-RN examination and acquire a permanent license in the state of intended employment. Notwithstanding, the petitioner expects the beneficiary to train, supervise, and assess licensed registered nurses. The notion that a "limited permit" or unlicensed nurse would be responsible for a nursing staff's activity coordination, procedures training, professional development, performance evaluation, and regulatory compliance is unreasonable and impractical.

The second paragraph at the last page of the decision states:

Fifth, the record does not include evidence that the beneficiary is a licensed registered nurse in New York or other evidence that shows the beneficiary is immediately eligible to practice registered nursing in the state of New York.

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, 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); and "expediently and expertly process[ing] information from different sources and synthesiz[ing] the 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 of a supervisory nurse while also complying with New York State's limited permit requirement that he be immediately and personally supervised by a registered nurse, the director was correct in finding that the evidence does not establish 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 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 New York or other evidence that shows the beneficiary is immediately eligible to practice registered nursing in the state of New York.” Accordingly, the petition must also be dismissed on the independent ground that the petitioner has not established that the beneficiary possesses the license or limited permit 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 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. 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.

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.