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

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 02 213 52521 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[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 director of the service center 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 hospital that seeks to employ the beneficiary as a registered nurse (RN). 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: (1) the proffered position is not a specialty occupation; and (2) the beneficiary is not qualified to perform the duties of a specialty occupation. On appeal, counsel submits a brief and previously submitted evidence.

Section 214(i)(l) of the Immigration and Nationality Act (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.

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; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an RN. Evidence of the beneficiary's duties includes: the Form I-129; the March 11, 2002 letter accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail, in part, caring for patients in the cardiovascular telemetry unit who have had serious operations or are recovering from an illness or accident. The letter stated that, except for attending meetings, education classes, and performing preparatory work, the beneficiary would spend all of her time there. The petitioner stated that a candidate must possess a bachelor's degree or its equivalent in nursing.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director stated that the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) reveals that the proffered position's duties resembled those of an RN and nurse supervisor and that there are three major educational paths to registered nursing: an associate degree in nursing, a bachelor of science degree in nursing, and a diploma. Next, the director found that the petitioner failed to explain and document the qualitative difference between the curriculum of the bachelor of science in nursing and the associate degree in nursing. The director gave little weight to the position statements of the Department of Veterans Affairs (VA), the American Association of Colleges of Nursing (AACN), and the medical expert opinions. The director found the VA nurse classification system incongruous to both the nursing profession and the proffered position. The director relayed statistics about the percentage of RNs, 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, and the director rejected the petitioner's claim that registered nursing experience is equal to baccalaureate-level study. According to the director, the petitioner normally does not require a bachelor's degree for the position. Last, the director mentioned that the beneficiary is not qualified to perform the duties of the proffered position.

On appeal, counsel states that the proffered position qualifies as a specialty occupation, and counsel refers to the description of the proffered position, a November 27, 2002 memorandum, two letters from alleged independent medical experts, a *Journal of the American Medical Association* (*JAMA*) study, information about degree programs in nursing, a press release, and evidence from the VA.

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 petitioner's March 11, 2002 letter claimed that CIS has already determined that the proffered position is a specialty occupation since it has approved other, similar petitions in the past. To support this statement, the record contains over 30 approval notices. 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 the record of their proceedings, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the petitions were parallel to the offered position.

Furthermore, 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). If the other nonimmigrant petitions were approved based on facts identical to those contained in the current record, those approvals would be in violation of paragraph (h) of 8 C.F.R. § 214.2, and would constitute material and gross error on the part of the director. 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).

The AAO next considers 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 *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)).

Counsel claims that the petitioner satisfies the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) because the November 27, 2002 memorandum (the nurse memo) stated that critical care nurses and other specialty care nurses qualify for H-1B classification. Counsel therefore maintains that the proffered position qualifies as a specialty occupation: it is a critical care and specialty nursing position that entails working in the petitioner's cardiovascular telemetry unit. Counsel states that the director's denial letter mentioned that there are three major paths that lead to an entry-level position in nursing, and counsel emphasizes that this does not apply to the proffered position: it is not an entry-level position.

The assertions do not prevail in establishing that the proffered position qualifies as a specialty occupation under the first criterion. Indeed, the nurse memo acknowledged that an increasing number of nursing specialties, such as critical care and operating room care, require a higher degree of knowledge and skill than a typical RN or staff nurse position.[1] Nevertheless, the mere fact that a nursing position has a title such as "critical care" does not necessarily mean that it qualifies as a specialty occupation.[2]

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[1] Memorandum from Johnny N. Williams, Executive Associate Commissioner, INS Office of Field Operations, *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses,* HQISD 70/6.2.8-P (November 27, 2002).

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

CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. While the nurse memo specifically states that a petitioner may be able to demonstrate, through affidavits from independent experts or other means, that the nature of the position's duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree (or its equivalent), CIS maintains discretion to use as advisory opinions statements submitted as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). CIS must be satisfied that the ultimate employment of the alien is in a specialty occupation, regardless of the position's title.

CIS often looks to the *Handbook* when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. After a careful review of the *Handbook*, the AAO finds that the beneficiary's proposed duties closely resemble those performed by registered nurses who provide direct patient care by observing, assessing, and recording symptoms, reactions, and progress; assisting physicians during treatments and examinations; administering medications; and assisting in convalescence and rehabilitation. Hospital nurses, the *Handbook* states, are mostly staff nurses who provide bedside nursing care and carry out medical regiments. These nurses, the *Handbook* reports, are usually assigned to one area, such as surgery, maternity, or intensive care. As such, the proffered position's duty of caring for patients in the hospital's cardiovascular telemetry unit who have had serious operations or are recovering from an illness or accident – as described in the petitioner's July 12, 2002 letter - would be performed by a registered nurse as delineated in the *Handbook*.

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.
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> . . . [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.

Thus, according to the *Handbook*, candidates for the offered position would not require a bachelor's degree for entry into the occupation.

The evidence contained in the record fails to show that the petitioner established that a baccalaureate degree in a specific specialty is the minimum for entry into the occupation. The record shows that the petitioner had

asserted that the VA has determined that registered nurse positions are specialty occupations because only candidates holding bachelor's degrees can occupy the positions. This assertion is weak. In the first place, the VA document entitled "Nurse Qualification Standard," revises the policy on the qualification standard for all persons appointed as registered nurses, but it does not establish that a baccalaureate or higher degree or its equivalent is the normal minimum for entry into the offered position. For instance, Appendix B of the document does not elaborate on whether the grade of nurse I (levels 1-3), which require either associate's or bachelor's degrees in nursing, are registered nurse positions assigned to a hospital's surgery, emergency care, maternity, cardiovascular telemetry unit, or intensive care units. Thus, we disagree with counsel's claim that the VA document portrays positions of specialty nurse - including cardiovascular telemetry unit nurse - at the grade of nurse III or higher.

The December 18, 1998 press release reveals that the VA and the AACN simply seek to provide nurses with innovative academic opportunities to obtain baccalaureate or higher degrees in a convenient setting. On page 2, the press release states that only 31 percent of registered nurses hold bachelor's degrees, and 32 percent hold associate degrees, plainly indicating that a bachelor's degree is not the minimum requirement for entry into the proffered position. Furthermore, the *Handbook* reveals that employers accept candidates with associate degrees in nursing. Thus, based on the evidence in the record, the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The evidence in the record fails to establish the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations. The November 27, 2002 memorandum and the VA documentation are not probative in establishing the second criterion. Again, the mere fact that a nursing position has a title such as "critical care" does not necessarily mean that it qualifies as a specialty occupation. The AAO has already set forth the deficiencies in the VA document and the December 18, 1998 press release. The *JAMA* article simply discusses the patient-to-nurse ratio in hospitals.

We note that counsel claims that the petitioner submitted "industry job announcements" in response to the request for evidence. No job announcements are in the record.

Neither does the record contain evidence to establish that the particular position is so complex or unique that it can be performed only by a person with a degree.

The third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that it normally requires a degree or its equivalent for the position. On page 13 of the appeal brief, counsel contends that the petitioner satisfies this criterion because all of its telemetry unit registered nurses are "baccalaureate nurses or the equivalent."

This contention is weak. 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.[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.

The evidence in the record is inadequate to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*). Counsel refers to the November 27, 2002 memorandum to state that specialty nurse positions – such as the proffered position – require a bachelor's degree. Again, the title of a nursing position such as "critical care" does not necessarily mean that the position qualifies as a specialty occupation. Instead, the actual duties of the proffered position are controlling.

The article from the *JAMA* and the information about degreed nursing programs is irrelevant in establishing that the proffered position requires a bachelor's degree in nursing. The article merely discusses improving the nurse to patient ratio. 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."

The director properly determined the deficiency in the letters: the expert opinion letters use similar language. While we acknowledge that these individuals have endorsed the petitioner's position regarding the requirement for a bachelor's degree, the letters are very similar and counsel admits that they are based on a form letter provided to each expert. The exact wording of the passages in the letters carries diminished weight, as it may not necessarily reflect the exact views of the person who signed it.

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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.

Counsel alleges that CIS approves H-1B classification for beneficiaries seeking registered nurse positions in the state of North Dakota, while discriminatorily denying this classification to beneficiaries seeking registered nurse positions in the state of Pennsylvania. Counsel alleges that because an RN position in the two states has essentially the same specialized and complex duties, the RN positions in both states should be considered specialty occupations.

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.

We note that counsel 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). This is not the case. 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 Immigration and Nationality Act (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 claims that the State of Pennsylvania neither offers the licensing examination outside of the United States nor has a limited permit. Counsel claims that the beneficiary will take the examination soon after entering the United States. Counsel attests that the U.S. consulate usually waives the requirement that the beneficiary possess a license to work immediately upon entry into the United States.

Counsel's claims are not convincing. A May 4, 1992 memorandum entitled "Temporary Licensure for H-1B Nonimmigrants" and issued by Lawrence J. Weinig, 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. 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. For this to apply, 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.

Noticeably absent from the record is an official statement from the licensing authority that indicates that the beneficiary is eligible for temporary licensure and that the license can be obtained immediately upon entering the United States.

The record does contain a document entitled "An Act" that the Commonwealth of Pennsylvania enacted. Section one of the document states that the act shall be known and cited as "the Professional Nursing Law." The Professional Nursing Law provides, according to paragraph (c) of section 5, that the State Board of Licensing (the Board) may admit to examination any person who has satisfactorily completed a nursing education program for the preparation of registered professional nurses in a country or territory not mentioned in other sections of the Professional Nursing Law who has been licensed, registered, or duly recognized there as a professional nurse provided such a program is considered by the Board to be equal to that required in this Commonwealth at the time such program was completed and who meets the requirements of character and preliminary education.

Again, no document is in the record from the Board attesting that the beneficiary may be admitted to examination. Consequently, we find 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.

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