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U.S. Citizenship
and Immigration
Services



FILE: EAC 02 092 53604 Office: VERMONT SERVICE CENTER Date: SEP 02 2004

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

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

ON BEHALF OF PETITIONER:



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 hospital that seeks to employ the beneficiary as a registered nurse. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the proffered position is not a specialty occupation and because the record did not establish that the beneficiary was licensed to practice nursing in the State of New York. On appeal, counsel submits a brief and other documentation.

The AAO will first analyze the evidence in order to determine whether the proffered position is a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (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 a registered nurse in the Cardiac Telemetry Unit. Evidence of the beneficiary's duties includes: the Form I-129; the petitioner's January 10, 2002 letter in support of the petition; 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: providing nursing care to patients with heart problems and monitoring equipment. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in nursing (BSN).

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director noted that according to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, an individual does not need to hold a baccalaureate degree in nursing to fill a registered nurse position. On appeal, counsel asserts that the petitioner meets the first, second, and fourth criteria described at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO will address the evidence with respect to these criteria.

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

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

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. Regarding the minimum requirement for entry into the nursing field, the *Handbook* states that there are several suitable educational paths, including associate degree programs, and licensed graduates of any of these programs qualify for entry-level positions. The *Handbook* notes that a bachelor's degree is often necessary for administrative nursing positions, and it is a prerequisite for admission to graduate nursing programs. The instant position does not fall into either of the latter two categories. The duties of the proffered position appear to be generic and amenable to performance by any licensed registered nurse.

Counsel maintains that the instant position is not an entry-level position, and that a BSN is a normal minimum entry requirement for nurses working in critical care areas such as the telemetry unit. Counsel asserts that the November 27, 2002, CIS policy memorandum on H-1B nurse petitions (nurse memo)¹ supports this

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).

contention, because the nurse memo acknowledged that an increasing number of nursing specialties require a higher degree of knowledge and skill than a typical registered nurse or staff nurse position. On page three, the nurse memo states that certification examinations are available to registered nurses who are not advanced practice nurses, but who may possess additional clinical experience. The memo mentions areas such as rehabilitation nursing and critical care. The record, however, contains no evidence that the proffered position requires a certification examination in a specific area, nor does it establish that the instant position would fall under the nurse memo's guidance on non-advanced practice registered nurses who may be H-1B eligible. The petitioner has not established the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Counsel asserts that the petitioner meets the second criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Regarding parallel positions in the petitioner's industry, counsel claimed that CIS had already determined that the proffered position was a specialty occupation, since CIS had previously approved other similar cases. The petitioner submitted thirty one I-797 Approval Notices for H-1B petitions, identified by counsel as pertaining to various nursing specialties, such as critical care, step-down units, and intensive care. This record of proceeding does not, however, contain all of the supporting evidence submitted to the Vermont Service center in the prior cases. In the absence of all the corroborating evidence contained in those records of proceeding, the documents submitted in this regard are not sufficient to enable the AAO to determine whether the other H-1B petitions were approved in error.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior cases were similar to the proffered position or were approved in error, no such determination may be made without review of the original records in their entirety. If the previous nonimmigrant petitions were approved based on facts similar to those found in the current record, the approvals would have been erroneous. CIS 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The record also contains materials from the U.S. Department of Veterans Affairs (VA) on its revised academic credentials for registered nurse employees and a press release from the American Association of Colleges of Nurses (AACN) regarding its collaboration with the VA on the revised academic credentials program. The director rightly pointed out that VA educational requirements do not necessarily represent the

industry standard in the field of nursing. Counsel also provides, on appeal, five letters from physicians who state that nursing positions such as the instant position require more education than other nursing jobs. It is noted that counsel listed the inclusion of eight such letters; however, only five are found on the record. These five letter writers, two of whom are associated with the petitioner, fail to provide any specific information about the proffered position. In fact, all the letters contain the same generic language. As such, these letters are not viewed as establishing an industry standard.

Counsel claims that the proffered position meets this requirement because the duties are complex; however, the AAO disagrees. The job description on the record contains duties that are routine to any registered nurse position, such as caring for patients, monitoring equipment, and assisting physicians. Counsel states that the job entails covering the mistakes of student doctors, who, although supervised by experienced doctors, are more likely to make critical mistakes. The petitioner has not submitted any documentary evidence to establish this claim, or how assisting student doctors under supervision brings a complexity or uniqueness to the position. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Accordingly, the petitioner has not established that the position is a specialty occupation based upon the complexity or uniqueness of its duties.

CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation, regardless of the petitioner's past hiring practices. *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.

The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2). The AAO will now address counsel's other contention on appeal, that 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, in accordance with the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The nurse memo, discussed above, refers to nursing positions beyond entry-level that may be H-1B eligible. The memo states that petitioners may demonstrate the specialization and complexity of these positions through affidavits from independent experts or other means. The evidence on the record, however, does not support further analysis of the instant position based on this CIS policy guidance. For example, none of the five physician letters provided addresses the nature of the duties that the beneficiary would perform within the petitioner's telemetry unit. The contents of all the letters are virtually identical, and they do not establish that the offered position is a specialty occupation, as discussed in the nurse memo. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty.

On appeal, counsel maintains that CIS normally approves H-1B petitions for registered nurses in North Dakota, while discriminatorily denying the same classification for registered nurses in New York. Counsel states that registered nursing positions in New York are equally specialized and complex as those in North Dakota; thus, the instant position should be considered a specialty occupation. Prior to August 1, 2003,

registered nursing positions in North Dakota qualified as H-1B positions, because the state of North Dakota required nurses to possess a BSN in order to practice in that state. As of August 1, 2003, however, North Dakota no longer requires a BSN for licensure by examination. Accordingly, registered nursing positions in North Dakota are no longer automatically considered to be H-1B eligible, and counsel's argument is moot. In sum, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Regarding the beneficiary's qualifications to perform the duties of the proffered position, the director noted that the record does not include evidence that the beneficiary is licensed to practice or is otherwise immediately eligible to work as a registered nurse in New York. On appeal, counsel cites the regulations regarding licensure at 8 C.F.R. § 214.2(h)(v)(B). According to this section, if a temporary license is available, the director is to 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. The H classification may be granted if it is determined that the alien under supervision is authorized to fully perform the duties of the occupation. Counsel points out that New York allows for temporary licensure of registered nurses, and adds that "the beneficiary will not be unduly limited by the need for supervision." The petitioner stated that the beneficiary has passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) certification program; thus, according to the petitioner, she is eligible for the one-year limited permit to practice nursing pursuant to New York licensing regulations.

The record contains no documentation regarding the beneficiary's CGFNS examination, nor any correspondence from the state of New York licensing authorities to demonstrate that she is eligible for the limited permit. Counsel's assertions in this regard are not substantiated by any evidence on the record. Statements of counsel in and of themselves do not constitute evidence. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

Moreover, New York state licensing rules specify that the holder of the temporary permit may work only under the immediate and personal supervision of a licensed registered nurse. Counsel's contention that the duties of the proffered position can be performed under supervision without any undue limitations on the beneficiary's activities appears to contradict information provided elsewhere in the record. For example, in its January 10, 2002 letter in support of the petition, the petitioner stated that the beneficiary would "be a deep resource for other nurses in the facility," and on appeal, counsel indicates that the beneficiary would be expected to detect errors made by student doctors. Nowhere in the record is there any indication that the beneficiary would play a subordinate role to another registered nurse. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). These inconsistencies regarding the level of responsibility described on the record and counsel's assertions that the position meets the criterion at 8 C.F.R. § 214.2(h)(4)(v)(B) have not been resolved. Thus, the evidence does not establish that the beneficiary is qualified to perform the duties of a registered nurse in the state of New York, and for this additional reason, the petition will be denied.

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

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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.