



U.S. Citizenship
and Immigration
Services

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FILE: EAC 02 242 53201 Office: VERMONT SERVICE CENTER Date: ..

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

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 corporation with two skilled nursing facilities and two personal care facilities. It seeks to employ the beneficiary in one of its long-term health care subsidiaries as a supervisory registered nurse. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and previously submitted evidence. Counsel also submits new documentation.

Section 214(i)(1) of the Immigration and Nationality Act (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 proceedings before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's requests for additional evidence, dated November 1, 2002, and March 24, 2003; (3) the petitioner's responses to the director's requests; (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 supervisory registered nurse. Evidence of the beneficiary's duties includes: the Form I-129, and the petitioner's responses to the director's requests for evidence. According to this evidence, the duties of the proffered position entail: performing administrative duties, assigning schedules for nurses, meeting with other upper level management, instructing other registered nurses how to deal with specific problems, and overseeing the care given to patients who have medical problems with complications. The petitioner stated that the beneficiary would spend 100 percent of her time as a supervisory nurse, with the exception of meetings, education classes and doing preparatory work. The petitioner stated that a candidate for the position must possess a bachelor's degree in nursing (BSN) or its equivalent.

The director found that the proffered position was not a specialty occupation. The director identified the position as a charge nurse or supervisory nurse, and described the position as a first line supervisor. The director referred to a CIS policy memo issued on November 27, 2002, (nurse memo), and acknowledged that an increasing number of nursing specialties require a higher degree of knowledge and skill than a typical registered nurse/staff nurse position.¹ However, the director stated that the proffered position of charge nurse or supervisory nurse is not similar to nursing positions such as nurse practitioner/midwife, or other nursing positions requiring very specialized and advanced skills that could qualify for H-1B eligibility. The director noted that statistics show that only 43.5 percent of all registered nurses have a four-year degree, and that a degree is also not required to obtain a registered nurse license.

The director also indicated that the nurse memo does not state that any position, with a title similar to the positions examined in the memo, is automatically to be considered a specialty occupation. The director further determined that none of the evidentiary materials submitted by the petitioner was sufficient to establish that the proffered position was a specialty occupation. In addition, the director stated that the copies of previously approved H-1B nursing petitions did not establish that the proffered position qualified as a specialty occupation. The director stated that the previously approved cases were not available for comparison, and that each case is adjudicated on its own merits. With regard to the establishment of an industry standard, the director referred to a statistical analysis conducted by the U.S. Department of Health and Human Services in 2000. According to the director, this study determined that only 27 percent of nurses working at nursing home or extended care facilities had at least a baccalaureate degree, and that only 29 percent of nursing supervisors had a baccalaureate degree in nursing.

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

On appeal, counsel states that the proffered position qualifies as a specialty occupation. Counsel identifies the proffered position as “upper level supervisory nurse,” “administrative and supervisory registered nurse,” and a “supervisory nurse and manager.” Counsel asserts that the director misstates the impact of the nurse memo when he disqualified charge nurses and supervisory nurses from H-1B eligibility because they are first line supervisors.

Counsel submits a job description for the proffered position entitled “3-11 Supervisory Nurse”. Counsel states that, of the twelve duties listed, ten are supervisory duties. With regard to the job duties for the proffered position, this document states:

- Report promptly to work on time.
- Assign CNA's to Nursing Stations, give out Assignments.
- Get Report from each Station and make Rounds.
- Supervise Main Dining Room, record Meal Completion.
- Monitor phone calls, distribution of snacks and breaks.
- Monitor Residents for Safety, Dignity, Care, Etc.
- Contact NHA/DON for Missing Residents, Fires, Acute Emergencies.
- Monitor Documentation:
 - Meal Completion Books
 - Treatment Books
 - I's & O's on daily basis
 - Summaries and Accountability Sheets daily
 - Incident Investigations
- Assist with Documentation:
 - Take off Physicians' Orders
 - Summaries
 - ABT's/FN/Skilled – if an assessment by Supervisor has been done by them first
- Station III- Treatments when only 4 Nurses on (Emphasis in the original)
- Write/give Report for Supervisor & Book
- Employee Counseling/Warnings PRN

This description provides more details on the duties of the actual position, and also provides some new duties. For example, the duties of "monitoring phone calls, distribution of snacks and breaks," "contact NHA/DON for missing residents, fires, acute emergencies," and "Station III-Treatment when only four nurses on" do not appear in the petitioner's description of the job contained in the petitioner's response to the director's request for further evidence. In explaining these duties, counsel states that the nature of the care at a nursing home or long-term health care facility is very different from the type of care given in a hospital. Counsel further explains that the job duty that mentions "Station III" means that the beneficiary would fill in as a registered nurse at a station when there were not sufficient nurses available. Counsel states that with the exception of this job duty and of the first job duty, which states the beneficiary is to report to work on time, all the other duties are supervisory. Counsel also refers to other nursing personnel to whom the beneficiary would be subordinate, namely, the head nurse and the director of nursing.

Counsel resubmits the nurse memo and refers to Section C of the memo that addresses H-1B eligibility for nurses in administrative positions. Counsel also resubmits letters from two health and medical professionals as to the necessary educational credentials for upper level administrative nurses working in the petitioner's facility. One letter is from [REDACTED] a family practice physician with the Einstein Neighborhood Healthcare, Philadelphia, Pennsylvania, and the other is from [REDACTED] Executive Director, Capital Health Systems, Morrisville, New Jersey. Finally, counsel resubmits a *Journal of the American Medical Association (JAMA)* study on the ratio of patients to nurses. Counsel also refers to the previously submitted materials, namely, a directive from the U.S. Department of Veterans Affairs (VA) on revised nurse qualification standards, and a press release that detailed a collaborative agreement between the Veterans Health Administration (VHA), a part of the VA, and the American Association of Colleges of Nursing (AACN) to develop expanded opportunities for VA nurses to obtain baccalaureate and advanced degrees in nursing.

Counsel states that not all registered nurse positions are specialty occupations, and that not all registered nurse positions in a nursing home or long-term care facility must be filled by a registered nurse with the knowledge usually conferred by a baccalaureate degree in nursing. However, counsel notes that the experience and the training that an individual with an associate degree or diploma would receive before they can take meaningful positions in administrative and supervisory positions in the petitioner's facilities amount to the equivalent of a baccalaureate degree in nursing under CIS regulations.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first 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 Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from

firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

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. As correctly noted by the director, the AAO finds that the beneficiary's proposed duties are analogous to duties described in the *Handbook* for head nurses or nurse supervisors who work in nursing care facilities. With regard to the combination of supervisory job duties within the context of nursing homes, the 2004-2005 edition of the *Handbook* states:

Nursing care facility nurses manage care for residents with conditions ranging from a fracture to Alzheimer's disease. Although they often spend much of their time on administrative and supervisory tasks, RNs also assess residents' health, develop treatment plans, supervise licensed practical nurses and nursing aides, and perform invasive procedures, such as starting intravenous fluids.

....

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.

The proffered position, with its duties of assigning CNAs and other nursing personnel to their work for each nursing shift, is analogous to a supervisory nurse, and it also has duties that appear subordinate to other more upper level nursing staff. For example, the job description submitted on appeal has the beneficiary monitoring meal completion books, and monitoring phone calls, the distribution of snacks and breaks. The supervision of the main dining room and the recording of meal completion are not duties that appear to require the theoretical and practical application of a body of highly specialized knowledge associated with a baccalaureate degree in nursing. On appeal, counsel also mentions that the beneficiary would report to a head nurse and mentions a director of nursing (DON). The fact that the beneficiary in the proffered position would report a head nurse also appears to suggest that the position is not that of an upper-level supervisory manager.

In addition, the record is not clear as to how many nursing personnel the beneficiary would actually be supervising, and the extent to which the beneficiary would be performing direct nursing services. For example, the job description submitted on appeal identifies a Nursing Station III, and states that the beneficiary would fill in when less than four nurses were available. The record is devoid of any information as to how many nurses would normally be available on the evening shift, and with what frequency supervisory nurses have to fill in for other registered nurses and perform direct nursing services. This duty detracts from consideration of the position as an upper level supervisory manager position.

All of these factors diminish the weight to be given the proffered position as a specialty occupation analogous to the nursing administrator positions described in Section C of the nurse memo. It should also be noted that the nursing administrator positions appear to require graduate education in nursing or health administration, which is education beyond the baccalaureate level. Without more persuasive evidence, the director's description of the position as a first line supervisor registered nurse appears accurate. It is not clear why an

individual with an associate's degree in nursing and several years of experience could not perform the duties outlined for the proffered position.

The *Handbook* states the following about the training and educational requirements for registered nurse positions:

There are three major educational paths to registered nursing: associate degree in nursing (A.D.N.), bachelor of science degree in nursing (B.S.N.), and diploma. . . . Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses.

...

. . . [S]ome career paths are open only to nurses with bachelor's or advanced degrees. A bachelor's degree is often necessary for administrative positions, and it is a prerequisite for admission to graduate nursing programs in research, consulting, teaching, or a clinical specialization.

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

With regard to other materials submitted into the record by the petitioner, the article from the *JAMA* and the information about degree nursing programs are irrelevant in establishing that the proffered position requires a bachelor's degree in nursing. The *JAMA* article discusses improving the nurse to patient ratio and the impact that the current ratio has on patient care. The Internet information with regard to the coursework offered by two U.S. universities in their baccalaureate of nursing programs is not persuasive as to whether the proffered position requires the specialized knowledge usually obtained through a baccalaureate degree in nursing. The IU Northwest School of Nursing Program's philosophy statement seems nearly identical for the associate of science and 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 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."

As noted above, counsel also submitted materials from the VA on its revised academic credentials for registered nurse employees, and a press release from the AACN with regard to its collaboration with the VHA on its revised academic credentials program. However, the educational requirements formulated by the Department of Veterans Affairs do not necessarily represent the industry standard in the field of nursing. It should also be noted that other associations, such as the American Nursing Association (ANA), support a change in the nursing industry that would require a bachelor of science degree in nursing as the minimum credential for an entry-level position. However, the reality is, at the present time, neither the ANA nor any

other nursing association has made such a degree a minimum requirement. A nurse with an associate's degree can still work as a nurse, can join the ANA, and can have the ANA represent her/his interests. Thus, neither the materials from the VA nor the AACN constitute evidence from professional associations regarding an industry standard for the field of nursing.² 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. With regard to parallel positions, in the original petition, counsel submitted thirty-six I-797 Approval Notices for H-1B visa petitions. Counsel asserted that CIS had already determined that the proffered position is a specialty occupation since CIS had previously approved the submitted petitions. This record of proceeding does not, however, contain the supporting evidence submitted to the Vermont Service Center in the prior cases. In the absence of the corroborating evidence contained in those records of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine the basis for the other H-1B petition approvals.

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 prior approvals, no such determination may be made without review of the original records in their entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in the record of proceeding that is now before the AAO, however, the approval of the prior petitions would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

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

As previously noted, the petitioner submitted materials from the VA on its revised academic credentials for registered nurse employees, and on the VHA collaboration with the AACN. The AAO already addressed the

² The December 18, 1998 press release reveals that the VHA 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's degrees, plainly indicating that a bachelor's degree is not the minimum requirement for entry into the proffered position.

contents of these documents. Neither the materials from the VA nor the AACN constitute evidence from professional associations regarding an industry standard for the field of nursing.

In addition, counsel provided letters from two healthcare and/or medical professionals. These two individuals stated that upper level nursing managers, such as head nurses, nursing managers, nursing supervisors, and nursing shift managers are administrative positions at the petitioner's facility. The two letter writers further stated that such positions required that the nurse filling the position have a baccalaureate in nursing or health administration. However, the letter writers do not provide any specific information about the proffered position and the letters contained the same generic language. As such, these two letters are also not viewed as establishing an industry standard. In addition, as previously stated, the proffered position is not viewed as an upper level nursing manager. The record also does not contain evidence to establish that the particular position is so complex or unique that only an individual with a baccalaureate degree could perform it. Without more persuasive evidence, the petitioner has not established the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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. The record is devoid of any documentary evidence on individuals who have previously held the supervisory nursing position, or currently hold the position in the petitioner's facility. Relevant documentation would include evidence of the academic credentials of these individuals, proof of their employment by the petitioner, and any accompanying documentation to establish how relevant work and training in progressively responsible positions would establish the equivalent of a baccalaureate degree in nursing. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The evidence in the record is also 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 "supervisory nurse" does not necessarily mean that the position qualifies as a specialty occupation. Rather, the actual duties of the proffered position are controlling. As previously stated, several of the duties, such as the distribution of snacks, and the monitoring of telephone calls and meal completion, do not appear either specialized or complex. With regard to the letters submitted by the petitioner from healthcare and medical experts, the director properly determined the deficiency in the letters: both opinion letters use identical language. Furthermore, neither letter writer provided specific information with regard to the duties of the proffered position in the petitioner's facility, but rather spoke in generalities. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). Thus, the petitioner has not established that the proffered position is a specialty occupation.

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). 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.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. Pursuant to 8 C.F.R. § 214.2(h)(4)(v)(A), if an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien seeking H classification in that occupation must have that license prior to the approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

No evidence in the record indicates that the beneficiary possesses a license to practice as a registered nurse in the state of Pennsylvania or has passed a national licensing examination. There is no correspondence from the state of Pennsylvania licensing authorities to substantiate the eligibility of the beneficiary for temporary licensure. Without more persuasive evidence with regard to the question of licensure, the AAO finds that the beneficiary is not qualified to perform the duties of the proffered position. For this additional reason, the petition may not be approved.

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.