



U.S. Citizenship
and Immigration
Services

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FILE: EAC 02 218 50880 Office: VERMONT SERVICE CENTER Date: [Redacted]

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:

[Redacted area]

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.

Handwritten signature of Robert P. Wiemann in black ink.

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 proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence, dated January 10, 2003; (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 supervisory registered nurse. Evidence of the beneficiary's duties includes: the Form I-129; the petitioner's letter of support, dated May 1, 2002, that accompanied the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary, as one of the registered nurses assigned to an eight hour shift, would be responsible for the actions and job duties of all the nursing staff, including other registered nurses, licensed practical nurses, and certified nursing assistants. The petitioner provided the following breakdown of nursing personnel per shift: the day shift from 7 A.M. to 3 P.M. would employ four registered nurses (RNs), two licensed practical nurses (LPNs) and 13 certified nursing assistants (CNAs). The evening shift from 3 P.M. to 11 P.M. would employ three RNs, one LPN, and 10 CNAs. The night shift from 11 P.M. to 7 A.M. would employ two RNs, one LPN and 10 CNAs. The petitioner stated that the beneficiary would spend 100 percent of her time as a supervisory nurse, with the exception of time spent in educational activities. The petitioner stated that a candidate for the position must possess a bachelor's degree in nursing or its equivalent.

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). Citing the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the director stated that employers generally do not require a bachelor's degree for a registered nurse position. The director also 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

The director acknowledged that certain upper-level nursing management positions may qualify as specialty occupations, and then noted that the petitioner, who had been asked to provide more evidence as to why the position would be considered an upper-level nursing management position, had not provided any further documentation on this issue. The director further determined that the petitioner failed to explain and document the qualitative difference between the curriculum of a baccalaureate and associate degree, and questioned whether the expert opinion letters submitted by the petitioner represented the views of the avowed authors. The director gave little weight to the position statements of the American Association of Colleges of Nursing (AACN), the Veteran's Administration (VA), and the two expert opinion letters submitted by the petitioner. Instead, the director outlined statistics about the percentage of registered nurses, 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. The director then noted that, based on the study's statistics, the majority of nurse supervisors held less than 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).

According to the director, the petitioner did not establish that it had an established employment policy or practice of hiring only individuals with a BSN for the proffered position. In addition the director rejected the petitioner's contention about nursing experience equating to a bachelor's degree in nursing. Finally, the director stated that the record did not include evidence that the beneficiary was immediately eligible to practice registered nursing in the state of Pennsylvania.

On appeal, counsel states that the proffered position qualifies as a specialty occupation. Counsel then identifies the title of the proffered position as "administrative and supervisory registered nurse," and a supervisory nurse, also known as "nursing supervisor" and "nursing manager."

Counsel submits a new document to the record entitled "3-11 Supervisory Nurse." 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 or clarification of previous 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 initial description of the position. 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 mentioned 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 the first job duty, which states the beneficiary is to report to work on time, all the other duties are supervisory. In his expanded description of the duties of the positions, counsel 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 two letters from 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] family practice physician with the Einstein Neighborhood Healthcare, Philadelphia, Pennsylvania, and the other is from [REDACTED] Executive Director, Capital Health Systems, Morrisville, New Jersey. Counsel affirms that the views recorded in the statements submitted by the two experts are in fact their views, denies that the petitioner had submitted a fraudulent statement, and notes that the wording for the letters came from the Williams nurse memo. Finally, counsel resubmits information taken from the Internet on the BSN nursing programs at Nazareth College and Kent State University as to the coursework for their BSN programs, and 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 Veteran Affairs (VA) on revised nurse qualification standards, and a press release that detailed a collaborative agreement with the Veterans Health Administration (VHA) and the American Association of Colleges of Nursing (AACN) to develop expanded opportunities for VA nurses to obtain baccalaureate and advanced degrees in nursing. To illustrate the more in-depth nurse training that takes place in a four-year baccalaureate in nursing program, counsel examines the coursework provided by both Nazareth College and Kent State University in the care of adults/older adults in the third and fourth years of nursing studies.

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 *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. Although the petitioner and counsel describe the position as an upper level administrative supervisor, the AAO finds that the beneficiary's proposed duties are more analogous to duties described in the *Handbook* for registered nurses who work in nursing care facilities and nurse supervisors. With regard to these two nursing areas identified in the registered nurse classification, 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 duties of assigning CNAs and other nursing personnel to their work for each nursing shift are analogous to the duties of supervisory nurses; however, duties listed as monitoring meal completion books, and monitoring phone calls, distribution of snacks and breaks, and the supervision of the main dining room do not appear to be duties that require the theoretical and practical application of a body of highly specialized knowledge associated with a baccalaureate degree in nursing. The petitioner's response to the director's request for further evidence also referred to "assisting" with documentation, and "reporting to a head nurse." 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 suggests that the position is not that of an upper-level supervisory manager.

In addition, the director requested that the petitioner submit an organizational chart to further establish whether the proffered position was a high level administrative position. The petitioner and counsel chose not to submit any further documentation on this issue. The record is not clear as to how many nursing personnel the beneficiary would actually be supervising. For example, the beneficiary's job description submitted on appeal identifies a Nursing Station III; however, the record is devoid of any information as to how many nursing stations exist in the petitioner's facility. If the petitioner's initial breakdown of numbers of registered nurses assigned to the three shifts is accurate, it would suggest that the beneficiary, who appears to be hired for the night shift, would be supervising two other registered nurses, one licensed practical nurse, and 10 certified nursing assistants. This scenario would suggest that, based on the number of registered nurses for the evening shift, the beneficiary would be performing direct nursing care on a routine basis.

All of these factors diminish the weight given to any consideration of the proffered position as a specialty occupation analogous to the nursing administrator positions described in 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 position appears to be that of a beyond entry-level charge or supervisory nurse within a long-term care facility. 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.

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 the 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."

Counsel also submitted materials from the U.S. Department of Veteran Affairs (VA) on its revised academic credentials for registered nurse employees, and it submitted a press release from the American Association of Colleges of Nurses (AACN) with regard to its collaboration with the VA on the VA's revised academic credentials program. However, the petitioner has not shown that the educational requirements formulated by the Department of Veterans Affairs 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 in nursing degree 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.

The December 18, 1998 press release reveals that the VA and the American Association of Colleges of Nursing (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. 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 petitioner submits no further documentation with regard to parallel positions in similar long term nursing care facilities. In addition, as previously mentioned, the VA documentation and the AACN press release are not probative in establishing the second criterion. 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. The record also does not 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. Counsel contends that the petitioner satisfies this criterion because all of its supervisory nurses are baccalaureate nurses or the equivalent. However, 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/or any documentation with regard to progressively responsible work experience that would be found equivalent to a baccalaureate degree. 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” 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. On appeal, counsel admits that the language was taken from the nurse memo, prepared by counsel, and that the two writers used a form document prepared by counsel. However, 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.

It should be noted that counsel refers to the nurse memo and its discussion of the state of North Dakota's requirements for licensure of nurses. 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.

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.

The director also found that the beneficiary is not qualified to perform the duties of the proffered position. On appeal, counsel does not address this issue; however, the AAO concurs with this finding.

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. Counsel asserted, in the original petition, that the state of Pennsylvania does not allow the NCLEX test to be taken outside the state, and that the U.S. Department of State routinely provided a waiver for Philippine nurses to enter the United States to take the

NCLEX examination. Counsel also stated that since 2001 the state of Pennsylvania had utilized the services of the Commission on Graduates of Foreign Nursing Schools (CGFNS) to evaluate the credentials of its applicants for purposes of the issuance of limited permits to be used by registered nurses prior to receiving their permanent licensure. In its initial petition, the petitioner submitted the beneficiary's certification by the CGFNS dated May 1996. This document states that the certification is permanent and that the beneficiary passed both the nursing and English language proficiency sections of the CGFNS qualifying examinations.

A May 4, 1992 memorandum issued by the 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.² 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. However, 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.

The record does not contain any official correspondence from the state of Pennsylvania licensing authorities to substantiate counsel's assertions with regard to the eligibility of the beneficiary for temporary licensure. 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). Without evidence of licensure, the AAO finds 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.

² Memorandum from Lawrence J. Weinig, Acting Assistant Commissioner, INS Office of Adjudications (COADN), *Temporary Licensure for H-1B Nonimmigrants*, CO 214h-C (May 4, 1992).