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U.S. Citizenship
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FILE: LIN 04 196 51946 Office: NEBRASKA SERVICE CENTER Date: DEC 05 2005

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 materials 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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a medical center. It seeks to employ the beneficiary as a registered nurse and to extend her classification as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the ground that the record did not establish that the proffered position qualifies as 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.

As provided in 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 notice of intent to deny; (3) the petitioner's rebuttal thereto and supporting materials; (4) the director's decision; and (5) Form I-290B, an appeal brief, and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner describes itself as a non-profit medical center consisting of a 25-bed critical access hospital, a 106-bed long-term nursing facility, and a senior living facility. The petitioner indicates that it was established in 1938, has 300 employees, and has gross annual income of approximately \$10 million. It proposes to employ the beneficiary as a registered nurse. The duties of the position are described as follows: prescribing medical treatment and personal care services to the ill and injured; taking and recording vital signs; administering specified medication orally or by injection; and collaborating with physicians, the patient's family, and the health care team in delivering a plan of care. The petitioner states that the beneficiary is qualified for the job by virtue of her bachelor of science degree in nursing from the La Salle College in Bacolod City, the Philippines, granted April 3, 1988 – which a credentials evaluation service has determined to be equivalent to a bachelor of science in nursing (B.S.N.) from a U.S. college or university – and fifteen years of nursing experience.

In his decision the director referred to a policy memorandum of the legacy Immigration and Naturalization Service (INS) from November 2002 which provides guidance for CIS on the adjudication of H-1B petitions for registered nurses (*H-1B Memorandum*).¹ As noted in the *H-1B Memorandum*, North Dakota was the only one of the 50 states that required individuals to have a B.S.N. before they could be licensed to practice nursing in the state. Because of that baccalaureate requirement for licensure, a registered nursing position in North Dakota generally qualified for H-1B classification as a specialty occupation. In August 2003, however, North Dakota amended its Nurse Practice Act to no longer require a B.S.N. for state licensure as a registered nurse. Since a four-year baccalaureate degree is no longer required to practice nursing in North Dakota, the director concluded that the proffered position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). The director also determined that the proffered position does not meet the alternative criteria of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), (3), and (4). The health care industry does not normally require a baccalaureate or higher degree for entry into registered nursing positions, the director stated, citing information in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*, and the petitioner failed to document its claim that it normally requires a baccalaureate or higher degree for its nursing positions. In addition, the director found that the record failed to demonstrate that the duties of the proffered position are so specialized and complex that the knowledge required to perform them is usually associated with baccalaureate level knowledge in nursing.

In its appeal, filed in August 2004, the petitioner asserts that North Dakota's Board of Nursing has refused to implement the state law to create a registered nursing license that does not require a B.S.N. degree. The petitioner refers to a previously submitted newspaper article in The Bismarck Tribune, published in June 2004, which discussed the dispute between the Board of Nursing and the state legislature. Since the new state law was not being observed, the petitioner argues, registered nurses in North Dakota still qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) because a B.S.N. is the normal minimum requirement for entry into such a position. The petitioner also asserts that the proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) because the petitioner has normally required, and continues to require, its registered nurses to have a B.S.N. Counsel refers to a previously submitted letter from the petitioner's CEO stating that the petitioner normally requires a B.S.N. or its equivalent for registered nurses, that it "will continue to do so for the

¹ Memorandum of 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).

foreseeable future” regardless of the actions of the North Dakota legislature and the Board of Nursing, and that all of its currently-employed registered nurses except one (who has been working for the petitioner since the mid-1980s) hold a B.S.N. degree. Supplementing that letter the petitioner’s CEO submits another letter on appeal with a list of 28 individuals it claims to be its currently-employed nurses, the nursing schools they attended, the degrees they attained, and the years they graduated.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook*, *supra*, as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook*’s occupational descriptions as a reference, as well as the petitioner’s past hiring practices for the position. *See Shanti, Inc. v. Reno, id.*, at 1165-66.

The DOL *Handbook* describes the occupation of registered nurses, in pertinent part, as follows:

Registered nurses (RNs) work to promote health, prevent disease, and help patients cope with illness. They are advocates and health educators for patients, families, and communities. When providing direct patient care, they observe, assess, and record symptoms, reactions, and progress in patients; assist physicians during surgeries, treatments, and examinations; administer medications; and assist in convalescence and rehabilitation. RNs also develop and manage nursing care plans, instruct patients and their families in proper care, and help individuals and groups take steps to improve or maintain their health. While state laws govern the tasks that RNs may perform, it is usually the work setting that determines their daily job duties.

Handbook, 2004-05 edition, at 301-02. As for the educational requirements of registered nurses, the *Handbook* indicates that there are three alternative paths. They include a four-year B.S.N. degree from a college or university, a two- or three-year associate degree in nursing (A.D.N.) from a community or junior college, and the increasingly rare three-year diploma program at a hospital. *See id.* at 302. Thus, the *Handbook* makes clear that a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into a registered nursing position. Less than baccalaureate level education may suffice for many positions. The *Handbook* also notes that certain advanced practice nurses have educational and clinical requirements beyond those generally applicable to all RNs.

The *Handbook*’s information on the educational requirements for RNs accords with that in the previously cited *H-1B Memorandum*. The minimum requirement for entry into a registered nursing position, the *H-1B Memorandum* notes, is a two-year A.D.N. Though a four-year B.S.N. can be earned at some U.S. and foreign universities, the degree is not required for most entry-level nursing positions in the United States. The *H-1B Memorandum* indicates that certain advanced practice nurses – such as clinical nurse specialists, nurse practitioners, certified registered nurse anesthetists, or certified nurse-midwives – do require a B.S.N. or higher degree, which makes them specialty occupations. Likewise, some nursing specialties – such as critical care, peri-operative, rehabilitation nursing, oncology, and pediatric nursing –

require a B.S.N. or equivalent knowledge, making them specialty occupations as well. In addition, some nurses in high-level management positions – “such as an upper-level ‘nurse manager’ in a hospital administration,” according to the *H-1B Memorandum* – require a B.S.N. or higher degree, making them specialty occupations. The registered nurse position involved in this petition, however, is not an advanced practice nurse, a nursing specialty, or an upper-level nurse manager, as described in the *H-1B Memorandum*.

According to the *Handbook* and the *H-1B Memorandum*, therefore, the registered nurse position at issue in this petition would not require a B.S.N. or higher degree.

Though counsel asserts that the change in North Dakota state law in August 2003 – reducing the educational requirement for licensure of registered nurses to less than a B.S.N. degree – has not been implemented, thereby leaving the old law in effect, this claim is not supported by the evidence of record. The newspaper article from June 2004 discusses a dispute between the state legislature and the Board of Nursing about the implementation of the new law. The article does not indicate that the new law is invalid, or that it has been amended. The petitioner has submitted no documentary evidence to support its assertion that, as a result of the implementation dispute, North Dakota continues to observe its previous law requiring registered nurses to have a B.S.N. before they could be licensed to practice nursing in the state. Simply going on record without supporting documentation does not satisfy the petitioner’s burden of proof. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, the record fails to establish that registered nurses require a B.S.N. to obtain a license to practice nursing in North Dakota.

For the reasons discussed above, the proffered position does not meet the first alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), because the record does not establish that a B.S.N. or its equivalent is the normal minimum requirement for entry into the registered nurse position.

With respect to the second alternative criterion of a specialty occupation, there is no evidence in the record that a B.S.N. degree is common to the industry in parallel positions among similar organizations, as required for the proffered nursing position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor has the petitioner demonstrated that its nursing position is so complex or unique that it can be performed only by an individual with a B.S.N. degree, as required to qualify the position as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner asserts that the proffered position meets the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), because it has normally required, and continues to require, a B.S.N. for its registered nursing positions. The evidence of record, however, does not substantiate this claim. The list of 28 nurses submitted on appeal is not supplemented by any documentation confirming that those individuals actually work for the petitioner and in what capacity, or that those individuals are the only registered nurses in the petitioner’s employ. The list does not distinguish between nurses who were hired prior to the change in North Dakota law in August 2003, and those who may have been hired afterwards, when a B.S.N. was no longer the state-mandated minimum educational requirement for registered nurses. (In this connection, the petitioner has not provided an explanation of the changes in North Dakota law resulting from the Nurse Practice Act, aside from its reference to the newspaper article in the Bismarck Tribune.) Nor does the petitioner explain why, in the column listing the nurses’ degrees, only half are listed as having a B.S.N. while the other half are

designated simply as RN. This information appears to conflict with the petitioner's earlier assertion (in its rebuttal to the director's notice of intent to deny) that all of its nurses except one have bachelor's degrees. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In view of the evidentiary shortcomings discussed above, the AAO determines that the petitioner has failed to establish that it normally requires a B.S.N. degree or its equivalent for the position of registered nurse. Accordingly, the proffered position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Lastly, the proffered position does not meet the fourth alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the record does not establish that the duties of the position are so specialized and complex that a baccalaureate level of knowledge in nursing is required to perform them. The evidence fails to show that the duties of the proffered position could not be performed by an experienced individual with an A.D.N. level of knowledge in nursing.

Therefore, the record does not establish that the proffered position meets any of the criteria enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify as a specialty occupation. The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

Beyond the decision of the director, section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2)(A), provides that an alien must have "full state licensure to practice in the occupation, if such licensure is required to practice in the occupation" in order to be qualified to perform the services of a specialty occupation. The licensure requirement is further explained in the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A):

- A. *General.* 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 approval of the petition to be found eligible to enter the United States and immediately engage in employment in the occupation.
- B. *Temporary licensure.* If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, and the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.
- C. *Duties without licensure.* In certain occupations which generally require licensure, a state may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, the director shall examine the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

North Dakota, the state of intended employment, requires nurses to be licensed. *See Handbook, id.*, at 302. The record does not demonstrate that the beneficiary has a license, or a temporary license, from the State of North Dakota to practice nursing. Nor is there any evidence that the beneficiary is allowed by the State of North Dakota to practice nursing under the supervision of a licensed senior or supervisory nurse. Thus, the record does not show that the beneficiary has complied with the requirements for licensure set forth in section 214(i)(2)(A) of the Act, 8 U.S.C. § 1184(i)(2)(A), and the regulations at 8 C.F.R. § 214.2(h)(4)(v)(A)(A), (B), and (C), *supra*. For this additional reason, the petition may not be approved.

Notwithstanding the approval of the previous H-1B petition on behalf of the beneficiary, the current petition to continue the beneficiary's H-1B classification cannot be approved unless the record establishes current eligibility. The AAO is not required to approve applications or petitions in which eligibility has not been demonstrated merely because of a prior approval that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). 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 petitioner's record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Moreover, the AAO is never bound by a decision issued by a service center or a district director. *See 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). Only published precedent decisions are binding on all CIS employees in the administration of the Act. *See* 8 C.F.R. § 103.3(c). Thus, the approval of the previous H-1B petition has no legal bearing on the AAO's determination of the instant petition.

Accordingly, the record fails to establish that the proffered position is a specialty occupation, or that the beneficiary is licensed to practice nursing in North Dakota and is therefore qualified to perform services in a specialty occupation.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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