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FILE: EAC 02 165 53104 Office: VERMONT SERVICE CENTER Date: DEC 16 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:

SELF-REPRESENTED

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*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The 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.

As a preliminary matter, the AAO notes that effective August 3, 2005, the petitioner's attorney, [REDACTED] was suspended from practice before the Department of Homeland Security in immigration matters. While the AAO will consider his representations, it will not notify counsel of this proceeding.

The petitioner is a hospital that seeks to employ the beneficiary as a 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 on two grounds: that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation, and that the beneficiary was not qualified to perform the duties of a specialty occupation.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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 proposed position.

The record of proceeding before the AAO contains (1) the 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) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner, a hospital with 1,300 employees, was established in 1978 and has a gross annual income of \$226,387,000. It proposes to hire the beneficiary as a nurse. In the petitioner's February 5, 2003 response to the director's request for evidence, the petitioner stated that the proposed position "is a critical care and specialty nurse." The specific duties were set forth as follows:

The beneficiary is a registered nurse who will, except for attending meetings, education classes and doing preparatory work, spends [sic] virtually all of [her] time in an **Intensive Care Unit** [emphasis in original]. The nurse will have the following responsibilities: caring for patients who have had serious operations or serious medical problems, and who have also had complications caused by these problems. The patients are watched by medical doctors specially trained in the specialty area, as well as their specially trained students. This work involves monitoring the newest of equipment, utilizing modern technology, and having a depth of knowledge as well as breadth of knowledge that would enable the nurse to recognize even small symptoms of future complication. Failure to recognize these symptoms in time for the doctors to treat the patients could lead to debilitating conditions or even death.

The director denied the petition, finding that the petitioner had satisfied none of the four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation.

On appeal, counsel contends that the proposed position qualifies for classification as a specialty occupation, referring to the description of the duties of the proposed position, a November 27, 2002 CIS memorandum, letters from medical experts, a *Journal of the American Medical Association (JAMA)* study, information about degree programs in nursing, a press release, and evidence from the Department of Veterans' Affairs (the V.A.).

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A) and therefore has not demonstrated that the proposed position qualifies for classification as a specialty occupation.

The petitioner's January 23, 2002 letter of support, counsel's February 5, 2003 response to the director's request for evidence, and counsel's August 20, 2003 appellate brief all claim CIS has already determined that the proposed position is a specialty occupation since it has approved other, similar petitions in the past. To support this statement, the record contains over 30 approval notices. This record of proceeding does not, however, contain all of the supporting evidence submitted to the Vermont Service Center in the prior cases. In the absence of all of the corroborating evidence contained in the record of their proceedings, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the petitions were parallel to the offered position. Moreover, each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). If the other nonimmigrant petitions were approved based on identical facts that are contained in the current record, those approvals would be in violation of paragraph (h) of 8 C.F.R. § 214.2, and would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

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 AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Counsel contends that CIS's November 27, 2002 memorandum<sup>1</sup> (the nurse memo) stated that critical care nurses and other specialty care nurses qualify for H-1B classification. Counsel maintains that the position proposed here therefore qualifies as a specialty occupation: it is a critical care and specialty nursing position that entails working in the petitioner's intensive care unit. Counsel stresses that the proposed position is not an entry-level job.

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<sup>1</sup> Memorandum from [REDACTED], 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).

These assertions do not prevail in establishing that the proposed position qualifies as a specialty occupation. Indeed, the nurse memo acknowledged that an increasing number of nursing specialties, such as critical care and operating room care, require a higher degree of knowledge and skill than a typical RN or staff nurse position. Nevertheless, the mere fact that a nursing position has a title such as “critical care” does not necessarily mean that it qualifies for classification as a specialty occupation.<sup>2</sup>

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

CIS often looks to the *Handbook* when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. After a careful review of the *Handbook*, the AAO finds that the beneficiary’s proposed duties closely resemble those performed by registered nurses who provide direct patient care by observing, assessing, and recording symptoms, reactions, and progress; assisting physicians during treatments and examinations; administering medications; and assisting in convalescence and rehabilitation. Hospital nurses, the *Handbook* states, are mostly staff nurses who provide bedside nursing care and carry out medical regimens. These nurses, the *Handbook* reports, are usually assigned to one area, such as surgery, maternity, or intensive care. As such, the proposed position’s duty of to care for patients in the intensive care unit who have had serious operations or serious medical problems, and who have also had complications caused by these problems, would be performed by a registered nurse as illustrated in the *Handbook*.

The *Handbook* states the following regarding 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.

The *Handbook* continues:

. . . [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,

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

or a clinical specialization.

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

The evidence contained in the record fails to persuade the AAO that a baccalaureate degree in a specific specialty is the minimum standard for entry into this occupation. The petitioner asserts that the V.A. has determined that registered nurse positions are specialty occupations because only candidates holding bachelor's degrees can occupy such positions at its facilities. This assertion is not persuasive. First, the V.A. document entitled "Nurse Qualification Standard" revised the policy on the qualification standard for all persons appointed as registered nurses, but it does not establish that a baccalaureate or higher degree or its equivalent is the normal minimum for entry into the position. For example, Appendix B of the document does not elaborate on whether the grade of nurse I (levels 1-3), which requires either associate's or bachelor's degrees in nursing, are registered nurse positions assigned to a hospital's surgery, emergency care, maternity, or intensive care units.

The December 18, 1998 press release reveals that the V.A. 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 stated that only 31 percent of registered nurses hold bachelor's degrees, and 32 percent hold associate's degrees, which indicates plainly 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 upon the evidence in the record, the petitioner has failed 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 nurse memo and the V.A. documents are not probative in establishing the second criterion. Again, the mere fact that a nursing position has a title such as "critical care" does not necessarily mean that it qualifies as a specialty occupation. The deficiencies in the V.A. document and its December 18, 1998 press release have already been set forth. The *JAMA* article simply discusses the patient-to-nurse ratio in hospitals. Counsel's February 5, 2003 letter stated the following:

The present industry standard, for medical facilities employing registered nurses in these units, is baccalaureate degree in nursing preferred.

The letter continued:

Because of the great need, hospitals and other medical facilities cannot adopt a policy that requires a baccalaureate degree. However, they will take a baccalaureate nurse over an associate degree nurse for these positions.

There is no evidence to support the statement that "they will take a baccalaureate nurse over an associate degree nurse." Moreover, the quoted statements from counsel emphasize that a bachelor's degree is not an industry-wide requirement. An industry preference for a bachelor's degree is not synonymous with an industry standard, and does not rise to the "normally required" criterion imposed by the regulation. The other evidence in the record -- the V.A. documents and the AACN and *JAMA* articles -- also fail to establish the second criterion: that the industry requires a bachelor's degree.

Counsel contends on appeal that his response to the director's request for evidence included "industry job announcements." However, the AAO notes that these job announcements are not contained in the record.

Counsel has submitted three letters in support of his contention that the proposed position qualifies for classification as a specialty occupation: one from [REDACTED] Ph.D., CHE, dated January 13, 2003, one from [REDACTED] dated January 13, 2003, and one from [REDACTED] Ph.D., R.N., also dated January 13, 2003. The AAO notes that, other than the first few paragraphs which introduce the qualifications of the signer, the wording of each letter is identical. This raises the question as to whether these letters were in fact written by the persons signing them, or whether the petitioner provided the signers with templates that were simply printed on letterhead and signed. As such, the evidentiary weight of these letters is diminished.

Neither does the record contain evidence to establish that the particular position is so complex or unique that only a person with a bachelor's degree can perform it.

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. However, no evidence has been submitted to demonstrate that the proposed position qualifies under this criterion.

In order to establish eligibility under this criterion, the petitioner must demonstrate that it normally hires individuals with a bachelor's degree or its equivalent for the position, and evidence to support the assertion must be presented.

In addition, as the director has already stated, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> 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.<sup>3</sup> To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The evidence in the record is inadequate to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Counsel refers to the nurse memo to state that critical care nurse positions, such as the proffered position, require a bachelor's degree.

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<sup>3</sup> The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

Again, the title of a nursing position such as “critical care” does not necessarily mean that the position qualifies as a specialty occupation. Rather, the actual duties of the proffered position are controlling.

The article from the *JAMA* and the information about degreed nursing programs is irrelevant in establishing that the proffered position requires a bachelor’s degree in nursing. The article merely discussed improving the nurse to patient ratio. The IU Northwest School of Nursing Program’s philosophy statement seems nearly identical for the associate of science and a bachelor of science degrees. The associate of science program prepares its graduates “with the knowledge and skills to provide direct care to individuals within the family and community context.” Graduates are a “competent provider of nursing care, a conscientious practitioner who practices within the legal and ethical parameters of nursing, and an accountable/responsible manager of care.” Similarly, the bachelor of science graduate is “capable of practicing in a competing and responsible fashion as informed citizens in a dynamic and diverse society.” According to the philosophy statement, the baccalaureate nursing education merely provides a “broad foundation in the sciences and liberal arts necessary for preparing professional nurses who are capable of practicing in a competent and responsible fashion as informed citizens in a dynamic and diverse society.”

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

The allegation of discrimination is not persuasive. According to the nurse memo, the National Council on State Boards of Nursing (NCSBN) had previously confirmed that the state of North Dakota was 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 that “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. Thus, counsel’s argument is moot.

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). However, this is not the case. The director’s denial letter considered the evidence in the record and the duties of the proposed position to determine whether the petitioner satisfied any one of the four criteria. No language in the denial letter indicated that the director required that the petitioner establish all four criteria.

Accordingly, the petitioner has failed to establish that the proposed position is a specialty occupation, and the petition was properly denied on this ground.

The director also found that the beneficiary is not qualified to perform the duties of the proffered position. The AAO concurs with this finding.

According to the *Handbook*, all states and the District of Columbia require that students graduate from an approved nursing program and pass a national licensing examination.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires.

Pursuant to 8 C.F.R. § 214.2(h)(4)(v)(A), if an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien seeking H classification in that occupation must have that license prior to the approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

No evidence in the record indicates that the beneficiary possesses a license to practice as a registered nurse or has passed a national licensing examination. Counsel claims that the State of Pennsylvania does not offer the licensing examination outside of the United States but that the beneficiary will be able to take the examination soon after entering the United States. Counsel attests that the U.S. consulate in the Philippines waives the requirement that the beneficiary possess licensure to work immediately upon entry into the United States.

Counsel's claims are not convincing. A May 4, 1992 memorandum entitled "Temporary Licensure for H-1B Nonimmigrants" and issued by [REDACTED] Acting Assistant Commissioner, stated that the intent of the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A) is not to deny petitions where a license is required *solely* because the beneficiary did not possess the required physical presence in the United States necessary to obtain licensure. CIS will approve initial H-1B petitions where the alien is otherwise qualified but lack of physical presence in the United States is the sole bar to obtaining temporary licensure. 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 an official statement from the licensing authority that indicates that the beneficiary is eligible for temporary licensure and that the license can be obtained immediately upon entering the United States. Thus, the AAO agrees with the director that the beneficiary does not qualify to perform the duties of the proposed position.

The proposed position does not qualify as a specialty occupation, and the beneficiary does not qualify to perform the duties of a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

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.