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U.S. Citizenship
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FILE: EAC 02 213 52358 Office: VERMONT SERVICE CENTER Date: DEC 23 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 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 hospital that seeks to employ the beneficiary as a registered nurse (RN). 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 the grounds that (1) the proffered position is not a specialty occupation; and (2) the beneficiary is not qualified to perform a specialty occupation. On appeal, former counsel submits a brief and previously submitted evidence.¹

The AAO will first address the director's conclusion that the proposed position fails to qualify 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.

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.

¹ The petitioner's counsel was suspended from immigration practice before CIS effective August 3, 2005. All representations will be considered; however, counsel will not receive notice of these proceedings.

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

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director’s request for additional evidence; (3) the petitioner’s response to the director’s request; (4) the director’s denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary’s services as an RN. Evidence of the beneficiary’s duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner’s support letter; and the petitioner’s response to the director’s request for evidence. According to the petitioner’s March 11, 2002 letter, the beneficiary would perform duties that entail caring for patients in the cardiovascular telemetry unit (CTU) that are coming out of surgery or recovering from illness or accident. The petitioner stated that, except for attending meetings, classes, and performing preparatory work, the beneficiary would spend all of her time there. For the proposed position the petitioner requires a baccalaureate degree or its equivalent in nursing.

The director concluded that the nature of the proposed position is not so specialized, complex, or unique that only an individual with a degree can perform the job. The director stated that it is not evident that the attainment of a baccalaureate or higher degree is usually associated with the proposed duties. The director found that the petitioner’s assertions, that the nursing industry distinguishes “non-specialized” RNs for “specialized” RNs and that the proposed position is particularly specialized, complex, or unique within the nursing industry, was not supported by sufficient evidence. The Department of Labor’s (DOL) *Occupational Outlook Handbook* (the *Handbook*) reveals, the director stated, that the nursing industry distinguishes an RN from an advanced practice nurse and that a baccalaureate degree is not required for an RN. The record does not reflect that the proposed position is a nurse administrator or an advanced practice nurse; nor is there documentation demonstrating that the proposed position requires “admission to a graduate nursing program in research, consulting, teaching, or a clinical specialization or the equivalent thereof,” the director stated. According to the director, the petitioner failed to explain and document the qualitative difference between a baccalaureate degree and an associate degree curriculum. The director stated that the petitioner did not provide evidence showing how a fully licensed nurse with an associate degree or diploma is incapable of performing the duties of an RN working in a cardiac telemetry unit. The director stated that the licensing authority in the state of intended employment does not require an RN to hold a bachelor’s degree in nursing. The director discussed research conducted by the U.S. Department of Health and Human Services, Bureau of Health Professions, and observed that the New York State Education Department requires “at least a two-year degree or diploma from a program in general professional nursing.” The director found unpersuasive the evidence from the Department of Veterans Affairs (VA), the American Association of Colleges of Nursing (AACN), and the expert opinions of three physicians. The director concluded that the petitioner does not normally require a bachelor’s degree in a specific specialty for the proposed position, and rejected the assertion that registered nursing experience is equal to bachelor’s level studies. The director discussed *Defensor v. Meissner*, 201 F.3d. 384 (5th Cir. 2000). Finally, the director stated that the beneficiary is not qualified for the proposed position.

On appeal, to establish that the proposed position qualifies as a specialty occupation, previous counsel referred to H-1B approval notices, the description of the proposed position, a November 27, 2002 memorandum² (the nurse memo), letters from independent medical experts, a *Journal of the American Medical Association (JAMA)* study, information about degree programs in nursing, a press release from the AACN, the *Handbook*, and evidence relating to the VA.

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 petitioner's March 11, 2002 letter claimed that CIS has already determined that the proffered position is a specialty occupation since it has approved other, similar petitions in the past. To support this statement, the record contains 33 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 those records of proceedings, the documents submitted by former counsel are not sufficient to enable the AAO to determine whether those petitions parallel the proposed position. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approval was granted in error, no such determination may be made without review of the original record in its entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this 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).

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)).

² 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).

Previous counsel asserts that since the nurse memo states that critical care nurses and other specialty care nurses qualify for H-1B classification, the proffered position qualifies as a specialty occupation: it is a critical care and specialty nursing position that entails working in the CTU. This assertion, however, does not prevail in establishing the proffered position as a specialty occupation. 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 as a specialty occupation.³

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. 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. The *Handbook* reveals that the proposed duties closely resemble those of an RN, which is an occupation that is depicted in the *Handbook* as providing 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 that provide bedside nursing care and carry out medical regiments. These nurses, the *Handbook* reports, are usually assigned to one area, such as surgery, maternity, or intensive care. Based on the *Handbook*’s information, the beneficiary’s duty to care for patients that are coming out of surgery or recovering from illness or accident parallels that of an RN.

The *Handbook* describes the training and educational requirements for RN positions as follows:

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.

³ 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.

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, or a clinical specialization.

Based on the *Handbook's* information, an RN does not require a bachelor of science degree in nursing (B.S.N.), and since the proposed position resembles an RN, it also does not require a B.S.N.

Prior counsel asserts that the *Handbook* indicates that there are three major paths to becoming an RN, and they lead to an entry-level position in nursing; prior counsel further asserts that the proposed position in the CTU is not an entry-level position, and that the proposed position is cited in the nurse memo as not being a typical RN position. Counsel's assertions are not convincing. The proposed duties parallel those of an RN as that occupation is described in the *Handbook*, and the *Handbook* reports that an RN does not require a bachelor's degree in a specific specialty. The AAO has already relayed that although 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 as a specialty occupation.⁴

According to prior counsel, a B.S.N. or its equivalent is required for the proposed position. Prior counsel states:

Few, if any, of the nurses with such positions in a [t]elemetry [u]nit received those positions without many years of experience, certainly enough to make their education, under Service regulations, baccalaureate equivalent.

Prior counsel's contention is not persuasive. When determining whether a position qualifies as a specialty occupation, CIS considers educational equivalency only when a specific degree does not exist in an occupational field. *Tapis Int'l vs. INS*, 94 F.Supp. 2d 172 (D. Mass. 2000). Because the *Handbook* reveals that the field of nursing has various degree programs specifically related to nursing, CIS will not consider educational equivalency in determining whether the proposed position qualifies as a specialty occupation under the Act and regulations. Thus, prior counsel's assertion that the proposed position is a specialty occupation because the nurses in the telemetry unit have the equivalent to a baccalaureate degree is not persuasive.

⁴ The AAO has already noted that the nurse memo also mentions that certification examinations are available to RNs who work in such nursing specialties and possess additional clinical experience, but who are not advanced practice nurses.

The evidence in the record fails to establish the requirement of at least a B.S.N. for entry into the proposed position. The VA document "Nurse Qualification Standard," revised the policy standard for all persons appointed as RNs. But the document does not establish that the proposed position requires at least a B.S.N. For instance, Appendix B of the document explains the grade of nurse I (levels 1-3), but the explanation does not elaborate on whether this grade, which requires either associate's or bachelor's degrees in nursing, are RN positions assigned to a hospital's surgery, emergency care, maternity, or intensive care units. The December 18, 1998 AACN press release conveys that the VA and the AACN seek to provide nurses with innovative academic opportunities to obtain baccalaureate or higher degrees in a convenient setting. On page 2, the press release reported that 31 percent of RNs hold bachelor's degrees, and 32 percent possess associate's degrees; this evinces that a baccalaureate degree is not the minimum requirement for entry into an RN position, which the proposed position parallels. The *JAMA* article did not address the educational requirements of an RN; it discussed patient-to-nurse ratio in hospitals. The submitted information about college degree programs in nursing is not persuasive in establishing that the proposed position requires a B.S.N. as the program philosophy statements for an associate of science in nursing and a bachelor of science in nursing degree seem nearly identical. Both degrees prepare graduates as entry-level practitioners of nursing. The associate of science program prepares graduates "with the knowledge and skills to provide direct care to individuals within the family and community context" and 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." Likewise, the bachelor of science graduate is "capable of practicing in a competing and responsible fashion as informed citizens in a dynamic and diverse society." The baccalaureate nursing education's philosophy statement relays that the 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."

The AAO's conclusion, from the referenced evidence, is that the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position.

To establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) the petitioner must show that a degree requirement is common to the industry in parallel positions among similar organizations. The VA document, the *JAMA* article, the *Handbook*, the college degree programs in nursing, and the AACN press release are not persuasive in establishing an industry-wide degree requirement for the reasons already discussed in this decision.

We note that on page 16 of the appeal previous counsel states that the petitioner's response to the request for evidence included "industry job announcements"; however, the record does not contain job announcements.

To establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) the petitioner must establish that the particular position is so complex or unique that it can be performed only by a person with a degree. The AAO has discussed in this decision the shortcomings of the submitted evidence and the *Handbook's* information as it relates to the proposed position. Based on this analysis, the AAO finds that the petitioner failed to establish that the proposed duties have a uniqueness or complexity that would necessitate a

requirement for a B.S.N. Consequently, the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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. Former counsel asserts that the petitioner requires a B.S.N. or its equivalent for the proposed position. The AAO has conveyed earlier in this decision that when determining whether a position qualifies as a specialty occupation, CIS considers educational equivalency only when a specific degree does not exist in an occupational field. *Tapis Int'l vs. INS*, 94 F.Supp. 2d 172 (D. Mass. 2000). Given that the *Handbook* reveals that the field of nursing has various degree programs specifically related to nursing, CIS will not consider educational equivalency in determining whether the proposed position qualifies as a specialty occupation under the Act and regulations. The record contains no evidence that the petitioner has a past practice of requiring a B.S.N. for the proposed position. As such, the petitioner fails to establish this criterion.

The evidence in the record fails to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4): that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. None of the evidence reflects that the proposed duties require a B.S.N. due to their specialization and complexity. The VA document, the *JAMA* article, the *Handbook*, the college degree programs in nursing, and the AACN press release reflect that a B.S.N. is not required for the proposed position. The submitted letters from “independent medical experts” also fail to establish that a B.S.N. is required for the proposed position. The two expert opinion letters use identical language. While the AAO acknowledges that these individuals have endorsed the petitioner’s position regarding the requirement of a B.S.N., the letters are essentially identical; the evidentiary weight of these letters is diminished, as the signatories to the letters do not appear to have drafted the letters.

The AAO disagrees with previous counsel’s assertion that CIS approves H-1B classification for beneficiaries seeking RN positions in the state of North Dakota, while discriminatorily denying this classification to beneficiaries seeking RN positions in the state of West Virginia. Previous counsel states that since an RN position in the two states shares essentially the same specialized and complex duties, both of the positions should be specialty occupations. This assertion is not persuasive. According to the nurse memo, the National Council on State Boards of Nursing (NCSBN) confirmed that North Dakota is the only state that required a B.S.N. as a condition for licensure as an RN; the nurse memo conveys that when a B.S.N. is a prerequisite for practicing in the field, the position qualifies as a specialty occupation. While the nurse memo stated that “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, North Dakota no longer requires a B.S.N. for licensure by examination. Now, North Dakota is required to “adopt rules establishing standards for the approval of out-of-state nursing education programs,” which may include non-B.S.N. nursing education. Section 43-12.1-09 of the North Dakota Nurse Practices Act. As a consequence, a position for an RN within North Dakota is no longer automatically considered an H-1B position because the degree requirement no longer exists; the assertion that CIS discriminates against beneficiaries seeking RN positions in the state of West Virginia is moot, therefore.

Previous 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). Nothing in the denial letter suggests that the petitioner must establish all four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A); the denial letter reflects that the director considered the submitted evidence and the proposed duties in determining whether the petitioner satisfied any one of the four criteria outlined at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation.

The director concluded that the beneficiary is not qualified to perform the proposed position. Since the proposed position fails to qualify as a specialty occupation, the AAO finds that it is inconsequential to determine whether the beneficiary is qualified to perform the 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.