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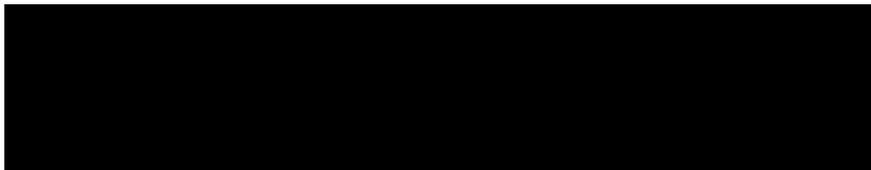
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

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U.S. Citizenship
and Immigration
Services

D2



FILE: EAC-02-257-54609 Office: VERMONT SERVICE CENTER Date: **FEB 22 2005**

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a hospital that seeks to employ the beneficiary as a 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 and the beneficiary is not qualified for the proffered position. On appeal, counsel submits a brief and previously submitted evidence.

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.

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 a registered nurse. Evidence of the beneficiary's duties includes: the Form I-129; the July 12, 2002 letter accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail, in part, caring for patients recovering from complicated coronary surgery, or who have post-surgical

complications, in a cardiac telemetry unit. The petitioner stated that a candidate must possess a bachelor's degree or its equivalent in nursing.

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). The director stated that employers generally do not require a bachelor's degree for a registered nurse position, and that the nursing industry distinguishes only registered nurses from advanced practice nurses. The director found 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 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 Department of Veterans Affairs (VA), and the expert opinion letters. The director delineated statistics about the percentage of registered nurses, hospital nurses, nurse supervisors, and head nurses holding associate degrees as documented by the U.S. Department of Health and Human Services, Bureau of Health Professions. According to the director, the submitted evidence did not establish that the petitioner normally requires a bachelor's degree for the position. The director rejected the petitioner's contention about experience equating to a bachelor's degree in nursing. Finally, the director mentioned that the beneficiary is not qualified to perform the duties of the proffered position.

On appeal, counsel states that the proffered position qualifies as a specialty occupation, and counsel refers to the description of the proffered position, a November 27, 2002 memorandum, letters from alleged independent medical experts, a *Journal of the American Medical Association (JAMA)* study, information about degree programs in nursing, a press release, and evidence from 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 July 12, 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 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. 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). 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).

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 claims that the November 27, 2002 memorandum (the nurse memo) stated that critical care nurses and other specialty care nurses qualify for H-1B classification. Counsel therefore maintains that the proffered position qualifies as a specialty occupation: it is a critical care and specialty nursing position that entails working in the petitioner's cardiac telemetry unit. Counsel emphasizes that the *Handbook* provides three major paths for an entry-level nursing position, and stresses that the proffered occupation is not an entry-level job.

The assertions do not prevail in establishing that the proffered 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.¹ 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.²

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. 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 proffered position's duty of caring for patients recovering from coronary surgery, or who have post-surgical complications, would be performed by a registered nurse as illustrated in the *Handbook*.

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

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).

² 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.

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* continued:

. . . [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 offered position would not require a bachelor's degree for entry into the occupation.

The evidence contained in the record fails to show that the petitioner established that a baccalaureate degree in a specific specialty is the minimum for entry into the occupation. The petitioner asserted that the VA determined that registered nurse positions are specialty occupations because only candidates holding bachelor's degrees can occupy the positions. This assertion is without merit. In the first place, the VA 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 offered position. For instance, Appendix B of the document does not elaborate on whether the grade of nurse I (levels 1-3), which require 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 VA and the AACN simply seek to provide nurses with innovative academic opportunities to obtain baccalaureate or higher degrees in a convenient setting. On page 2, the press release stated 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 nurse memo and the VA 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. We have already set forth the deficiencies in the VA document and the December 18, 1998 press release. The *JAMA* article simply discussed the patient-to-nurse ratio in hospitals. Counsel's January 17, 2003 letter stated: "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 that supports the statement "they will take a baccalaureate nurse over an associate degree nurse." 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). Simply going on record without supporting

documentary evidence is not sufficient for purposes 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 quoted statements from counsel emphasize that a bachelor's degree is not an industry-wide requirement. The other evidence in the record – the VA document and the AACN and *JAMA* articles - fail to establish the second criterion: that the industry requires a bachelor's degree.

We note that on appeal counsel contends that the petitioner's response to the request for evidence included "industry job announcements." The alleged job announcements, however, are not contained in the record of proceeding as currently constituted.

Neither does the record 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. 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 critical care nurses are baccalaureate nurses or the equivalent." This contention lacks substance. Educational equivalency is considered by CIS when a specific degree does not exist in an occupational field. *Tapis Int'l vs. INS*, 94 F.Supp. 2d 172 (D. Mass. 2000). As discussed, the *Handbook* explains that there are degree programs specifically related to nursing.

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 (5th 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.³ 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. 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 are irrelevant in establishing that the proffered position requires a bachelor's degree in nursing. The article merely discussed improving the nurse

³ 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.

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."

Finally, the submitted letters from "independent medical experts" are insufficient in establishing that a bachelor's degree or its equivalent is required for a registered nurse position. On appeal, counsel states:

There is a close similarity among all of the statements, as they were all prepared by petitioner's attorney and presented to the medical experts. However, despite the similarity, they all represent the views of the medical expert who has signed the statement.

The director properly determined the deficiency in the letters: all three expert opinion letters use identical language. While we acknowledge that these individuals have endorsed the petitioner's position regarding the requirement for a bachelor's degree, the letters are essentially identical and counsel admits on appeal that they were all prepared by the petitioner's attorney and presented to the medical experts. The letters thus carry diminished evidentiary weight.

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 West Virginia. 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.

This allegation 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 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. Counsel's argument is moot.

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). This is not the case. 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 indicated 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.

As related in the discussion above, 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. 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 beneficiary will be evaluated by the State of West Virginia for licensure prior to coming to the United States; that the State of West Virginia does not offer the licensing examination outside of the United States; and that the beneficiary will take the examination soon after entering the United States. Counsel attests that the U.S. consulate usually waives the requirement that the beneficiary possess a license 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 Lawrence J. Weinig, 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 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.