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U.S. Citizenship
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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date:

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 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 service center 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.

The petitioner is a hospital that seeks to employ the beneficiary as a registered nurse. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and additional documentation.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (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 in the neonatal intensive care unit. Evidence of the beneficiary's duties includes: the Form I-129; the January 22, 2002 letter of support; 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 in very serious condition; caring for newborns with special problems due to or caused by anesthesia, including, surgery, trauma, burn, pediatrics, neonatal, general medicine, cardiology cardiac surgery patients; complications of childbirth such as six, seven or eight month term babies; monitoring the condition of the patients; monitoring the newest equipment; and utilizing modern technology. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in nursing (BSN).

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 noted that the duties of the position were routine to any nursing position and, according to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, an individual does not need to hold a baccalaureate degree in nursing to fill a registered nurse position. The director found that the petitioner did not provide evidence that a fully licensed nurse who graduated from an associate or diploma program could not perform the duties of a registered nurse working in a neonatal intensive care unit.

On appeal, counsel states that the director ignored evidence. Counsel asserts that the Memorandum concerning H-1B Petitions and Nurses from the Executive Associate Commissioner Williams, dated November 27, 2002 (Nursing Memo) evidences that critical care nurses can qualify for the H-1B visa. Counsel contends that the director "has totally ignored the memorandum and stated exactly the preconceived ideas about nurses that were prevalent before the [redacted] Memorandum was promulgated." Counsel contends that the proffered position is not an entry-level position. Counsel asserts the petitioner requires registered nurses to fill the specialty position. Counsel submits three statements from independent medical experts stating "their belief that [the petitioner] requires a registered nurse with a minimum of a baccalaureate degree to fill the position being petitioned in the current petition."

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. As the director noted, no evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a registered nursing job.

The petitioner did not submit any evidence regarding parallel positions in the petitioner's industry. The petitioner submitted three identically worded expert opinion letters indicating that nursing in intensive care

units is a specialty occupation. The petitioner submitted one letter from a PhD who is employed as a program head of nursing at Commonwealth College at Penn State University, and an assistant professor of nursing at Penn State University. The second letter is from the president of a health association, the Hospital Council of Western Pennsylvania. The third letter was signed by an associate dean for nursing at Robert Morris University. All the letters state:

Due to the increased complexity of medical care, caused in part by advances in medical technique, medicine and medical technology, registered nurses require far more education than previously in certain areas of the hospital. Registered nurses, in these areas of the hospital require qualified nurses who possess, at the very minimum, a Bachelor of Science in Nursing (BSN) degree, with transcript, or the equivalent.

Registered nurses filling positions in the following areas of the hospital are filling positions in specialty occupations

These areas include registered nurses for all critical care units, including step-down units, intensive care units (ICUs), critical care units (CCUs), telemetry units, surgical and medical ICUs, medical-surgical units, cardiac care, recovery room and the like.

The AAO notes that the letters submitted to show that a degree requirement is common to the industry are essentially identical. As the letters appear to have been drafted by the same individual, CIS must question whether they represent the true testimony of the avowed authors. CIS may, in its discretion, accept letters and advisory opinion statements as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Counsel contends that the Nursing Memo proves that critical care nurses qualify for the H-1B visa, and that the proffered position falls under this category. The Nursing Memo states that certain specialized nursing occupations are likely to require a bachelor's or higher degree, and accordingly be H-1B equivalent. Additionally, the Nursing Memo goes on to explain that positions that likely require nurses who are certified advance practice nurses will generally be H-1B equivalent due to the advanced level of education and training required for certification. The Nursing Memo describes certain advance practice occupations that will generally be H-1B equivalent if the position requires and the alien has obtained, advanced practice certification in the following areas, specifically:

Clinical Nurse Specialist (CNS): Acute Care, Adult, Critical Care, Gerontological, Family, Hospice and Palliative Care, Neonatal, Pediatric, Psychiatric and Mental Health-Adult, Psychiatric and Mental Health-Child, and Women's Health.

The petitioner has not stated that it requires advanced practice certification for the proffered position in the neonatal unit or that the beneficiary has obtained this certification. Therefore, the Nursing Memo does not support counsel's contention that the proffered position qualifies as a specialty occupation.

Although counsel has stated that patients in the NICU are constantly at risk for immediate and particularly fatal setbacks, neither counsel nor the petitioner has described the duties of the position in sufficient detail to demonstrate that this position requires a baccalaureate degree. The petitioner has not demonstrated how an

experienced, licensed nurse without a degree would be unable to perform the duties of the proffered position. The petitioner has not sufficiently distinguished the duties of a nurse in the neonatal intensive care unit from those of an associate degree nurse.

The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The record does not contain any evidence of the petitioner's past hiring practices and therefore, the petitioner has not met its burden of proof in this regard.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

Counsel contends that the depth of knowledge gained by baccalaureate nurses can be best demonstrated by looking at the curricula of several colleges. Counsel highlights several courses dealing with older adults and states that he was not able to find more than one course dealing with older adults in various associate degree programs. Counsel concludes that this is "typical of the in-depth education that is available in a baccalaureate program." Counsel contends that "[n]one of this is available in the associate [program]. All of this is particularly applicable to the present position being offered." While a neo-natal nurse may possess greater skills and experience than an entry-level nurse, the petitioner has not proved that those skills and experience can only be acquired by earning a bachelor's degree. Counsel asserts repeatedly that the duties of the proffered position are too complex to be performed by an entry-level nurse, but that does not establish that the duties could not be performed by an experienced nurse with less than a bachelor's degree. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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