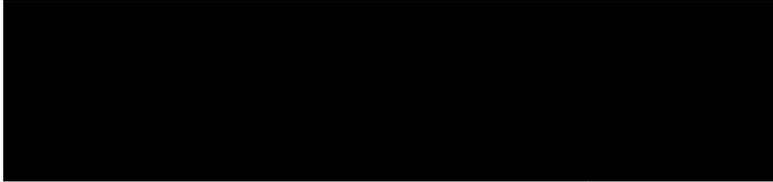




U.S. Citizenship
and Immigration
Services

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FILE: EAC 02 134 51943 Office: VERMONT SERVICE CENTER Date: NOV 17 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 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, the petitioner¹ 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.

¹ The AAO notes that counsel was suspended from practice before CIS on August 3, 2005. All representations will be considered, but counsel will not receive notice of these proceedings.

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 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 recovering from complicated surgery, or who have post-surgery complications involving but not limited to neurosurgery, trauma and the like. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in nursing (BSN).

The director issued a request for additional evidence. The director requested additional evidence that the registered nurse position in the intensive care unit (ICU) requires at least a baccalaureate degree to perform the nursing duties as described in the instant petition. The director requested an explanation of why a registered nurse without a bachelor's degree could not perform the duties of the proffered position. The director noted that the proffered position requires a registered nurse license which is obtainable with less than a bachelor's degree. The director requested a more detailed statement of duties specifying which tasks require the expertise of someone who holds a baccalaureate degree. The director requested a list of individuals that are currently employed in the same capacity as the proffered position and this list should indicate their degree(s), field(s) of study, date hired, date degree received, and immigrant status, if applicable. The director notes that the petitioner refers to the Department of Veteran's Affairs and the director indicated that this agency does not represent the industry as a whole and does not set the standards for the industry. The director also acknowledged that the petitioner submitted evidence of many previously approved petitions and noted that each case is adjudicated on its own merits. Finally, the director requested a letter from the appropriate State of Pennsylvania licensing authority stating that a baccalaureate degree is the minimum requirement to obtain a registered nurse license. The director requested documentation confirming that the beneficiary holds a registered nurse license.

In response, the petitioner asserted 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. The petitioner submits three letters from "independent medical experts stating their belief that Allegheny General Hospital requires a registered nurse with these qualifications to fill the position being petitioned in the current petition." The petitioner submitted an expanded job description of registered nurse duties in the intensive care unit. The petitioner asserts that the education and experience necessary for the registered nurse to fill this role in the hospital is at a much higher level than that attained by a registered nurse who has studied only for two years. Additionally, the petitioner asserted that there is a shortage of registered nurses and that the petitioner fills these positions with nurses who have a BSN or the equivalent. Additionally, the petitioner asserted that a baccalaureate program imparts necessary theoretical and practical application of highly specialized nursing knowledge that is notably absent from the associate or diploma degree program. The petitioner contended that the additional general studies courses taken during the baccalaureate program form the structure on which the student, after graduation, takes leadership roles in the profession.

The petitioner asserted that CIS requires that all four criteria be met by petitioners in the State of Pennsylvania. The petitioner concedes that the State of Pennsylvania does not require a baccalaureate degree in order to obtain licensure. The petitioner explained that the Pennsylvania exam is not given outside of the state; however the beneficiary will be able to take the exam in Pennsylvania soon after entry, and the petitioner explained that the U.S. consul normally waives this requirement for beneficiaries coming to Pennsylvania.

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 an intensive care unit.

On appeal, the petitioner states that the director ignored the evidence of record. The petitioner asserts that the Nursing Memo evidences that critical care nurses can qualify for the H-1B visa. The petitioner contends that the beneficiary meets the standard as a critical care nurse. The petitioner contends that the proffered position is not an entry-level position. The petitioner asserts it requires registered nurses to fill the specialty position. The petitioner 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." Additionally, the petitioner refers to the nursing requirements of the Veteran's Administration in support of its assertions that a four-year degree is required for a registered nurse in an intensive care unit.

The petitioner noted that CIS approved other petitions that had been previously filed on behalf of other registered nurses. The director's decision indicated that he did not review the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals 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).

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).

Additionally, the petitioner refers to the nursing requirements of the Veteran's Administration in support of its assertion that a four-year degree is necessary for a registered nurse position. However, as addressed by the director, the hiring practices of the Veteran's Administration are not applicable and do not set the industry standard.

The petitioner 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 explains 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 intensive care unit or that the beneficiary has obtained this certification. Therefore, the Nursing Memo does not support the petitioner's contention that the proffered position qualifies as a specialty occupation.

Although the petitioner has stated that patients in ICU are constantly at risk for immediate and particularly fatal setbacks, neither the petitioner 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 baccalaureate degreed nurse in the intensive care unit from those of an associate degreed 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)(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. The petitioner asserts that the associate degree nurse has much less education than a baccalaureate degree nurse. The petitioner states that a baccalaureate degree nurse takes courses in critical care as well as other types of medicine that are not available to the associate degree nurse. While an

intensive care 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. The petitioner 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 petitioner asserts that it takes long years of training to train an entry-level nurse for this position and that the petitioner does not have this option. The assertions of the petitioner do not constitute evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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.