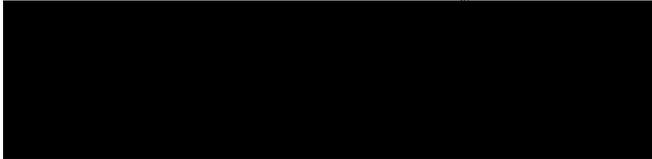


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FILE: WAC 04 007 50769 Office: CALIFORNIA SERVICE CENTER Date: OCT 26 2005

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:
[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials 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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a convalescent hospital. It seeks to employ the beneficiary as a critical care nurse and to classify her 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 the proffered position is not a specialty occupation and the beneficiary is not qualified to perform services in a specialty occupation, as she lacks the requisite nursing license from the State of California.

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.

As provided in 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.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2)(A) provides that an alien must have "full state licensure to practice in the occupation, if such licensure is required to practice in the occupation" in order to be qualified to perform the services of a specialty occupation. The licensure requirement is further explained in the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A), in pertinent part, as follows:

- A. *General.* 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 approval of the petition to be found eligible to enter the United States and immediately engage in employment in the occupation.
- B. *Temporary licensure.* If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, and the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.
- C. *Duties without licensure.* In certain occupations which generally require licensure, a state may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, the director shall examine the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B and an appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner describes itself as a convalescent hospital, established in 1999, with 60 employees and a gross annual income of approximately \$3 million. It proposes to hire the beneficiary as a critical care nurse. The duties of the position, and the estimated percentage of time each duty will take, are listed by the petitioner as follows:

- 25% Act in the convalescent or home care setting where patients require complex assessment, high intensity therapies and interventions, and continuous nursing vigilance.
- 20% Act as clinician. She is responsible for the identification, intervention and management of clinical problems to improve care for patients and families.
- 20% Provide direct patient care, including assessing, diagnosing, planning and prescribing pharmacologic and non-pharmacologic treatment of health problems.
- 18% Take care of health history and risk appraisal, interpretation of diagnostic tests and providing treatment, which may include prescribing medication.
- 10% Perform the other regular duties of nurses in acute care in a hospital setting, unless the performance of such duties will require possession of a state license.

- 7% Report regularly to the nursing administrator, doctors, and administrators on the progress of her work and on the critical care problems of patients.

The minimum educational requirement for the proffered position, the petitioner stated, is a bachelor's degree in nursing (B.S.N.). The record shows that the beneficiary received a B.S.N. from Perpetual Help College of Laguna, in the Philippines, on March 30, 1992. The record also includes photocopies of the petitioner's quarterly wage withholding report for the first quarter of 2003, the petitioner's operating license from the State of California, and a listing of other healthcare centers in the petitioner's corporate group, all located in California.

In his decision the director determined that the proffered position is not a specialty occupation. The director found that the duties of the proffered position are those of a registered nurse, as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*, and cited an excerpt from the *Handbook* indicating that the minimum educational requirement for a registered nurse is an associate's degree. There is no common standard in the industry requiring registered nurses to have a baccalaureate or higher degree in the field, the director stated, and the duties of the proffered position and its level of responsibility did not indicate complexity or authority beyond that normally encountered in the occupational field of registered nursing. The director concluded that the proffered position did not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director also found that the beneficiary did not possess a license from the State of California to practice nursing, in accordance with section 214(i)(2)(A) of the Act, 8 U.S.C. § 1184(i)(2)(A).

On appeal counsel asserts that the proffered position is that of a critical care nurse requiring a B.S.N. degree. The duties of a critical care nurse, counsel contends, are more specialized, demanding, and sophisticated than the duties of a registered nurse, and can only be performed by a nurse with experience in critical care situations such as that gained in a hospital's intensive care unit, pediatric ICU, neonatal ICU, cardiac care unit, or emergency department and recovery room. According to counsel, a critical care nurse in California, unlike registered nurses, does not need a state license. The lack of a license, therefore, is no bar to granting the beneficiary H-1B classification.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook, supra*, as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, Inc. v. Reno, id.*, at 1165-66.

The DOL *Handbook* describes the occupation of registered nurses, in pertinent part, as follows:

Registered nurses (RNs) work to promote health, prevent disease, and help patients cope with illness. They are advocates and health educators for patients, families, and communities. When providing direct patient care, they observe, assess, and record

symptoms, reactions, and progress in patients; assist physicians during surgeries, treatments, and examinations; administer medications; and assist in convalescence and rehabilitation. RNs also develop and manage nursing care plans, instruct patients and their families in proper care, and help individuals and groups take steps to improve or maintain their health. While state laws govern the tasks that RNs may perform, it is usually the work setting that determines their daily job duties.

Hospital nurses form the largest group of nurses. Most are staff nurses, who provide bedside nursing care and carry out medical regimens. They also may supervise licensed practical nurses and nursing aides. Hospital nurses usually are assigned to one department, such as surgery, maternity, pediatrics, the emergency room, intensive care, or the treatment of cancer patients. Some may rotate among departments

Home health nurses provide nursing services to patients at home. RNs assess patients' home environments and instruct patients and their families. Home health nurses care for a broad range of patients, such as those recovering from illnesses and accidents, cancer, and childbirth. They must be able to work independently and may supervise home health aides.

Handbook, 2004-05 edition, at 301-02. In accord with the director's decision, the AAO determines that the duties of the proffered position reflect those of a registered nurse providing services to patients in the hospital and/or at home, as described in the above excerpts from the *Handbook*. As for the educational requirements of registered nurses, the *Handbook* indicates that there are three alternative paths. They include a four-year B.S.N. degree from a college or university, a two- or three-year associate degree in nursing (A.D.N.) from a community or junior college, and the increasingly rare three-year diploma program at a hospital. *See id.* at 302. Thus, the *Handbook* makes clear that a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into a registered nursing position. Less than baccalaureate level education may suffice for many positions. The *Handbook* also notes, however, that certain advanced practice nurses have educational and clinical requirements beyond those generally applicable to all RNs.

A policy memorandum from the legacy Immigration and Naturalization Service in November 2002 provides additional guidance for CIS on the adjudication of H-1B petitions for registered nurses. In surveying the educational requirements for the nursing occupation, the *H-1B Memorandum* notes that the minimum requirement for entry into the field as a registered nurse is a two-year associate degree in nursing (A.D.N.). Though a four-year B.S.N. can be earned at some U.S. and foreign universities, the degree is not required for most entry-level nursing positions in the United States. The *H-1B Memorandum* indicates that certain advanced practice nurses – such as clinical nurse specialists, nurse practitioners, certified registered nurse anesthetists, or certified nurse-midwives – do require a B.S.N. or higher degree, which makes them specialty occupations. Likewise, some nursing specialties – such as critical care, peri-operative, rehabilitation nursing, oncology, and pediatric nursing – require a B.S.N. or equivalent knowledge, making them specialty occupations as well. In addition, some nurses in high-level management positions – “such as an upper-level ‘nurse manager’ in a hospital administration,” according to the *H-1B Memorandum* – require a B.S.N. or higher degree, making them specialty occupations.

Though counsel asserts that the position at issue in this petition is a critical care nurse requiring a B.S.N. degree – the duties described by the petitioner do not exceed the scope of a typical registered nurse providing services to patients in a hospital or home care setting. The petitioner has submitted no documentation demonstrating that the duties of the proffered position are primarily those of a critical care nurse – *i.e.*, that the primary duties of the position are beyond those of an ordinary registered nurse in an acute care setting and that the position requires a B.S.N. degree rather than a sub-baccalaureate A.D.N. degree. Simply going on record without supporting documentation does not satisfy the petitioner's burden of proof. *See 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)). Nor does the record reflect that the petitioner requires any advanced practice certification for the position, which might be expected if the position involved a clinical nurse specialist. *See H-1B Memorandum*. Thus, the record fails to establish that the proffered position is a critical care nursing specialty, as discussed in the *H-1B Memorandum*, and that a baccalaureate or higher degree in the specific specialty of nursing – *i.e.*, a B.S.N. – is the normal minimum requirement for entry into the position. Accordingly, the position does not meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

With respect to the second alternative criterion of a specialty occupation, there is no evidence in the record that a B.S.N. degree is common to the industry in parallel positions among similar organizations, as required for the proffered nursing position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor has the petitioner demonstrated that its nursing position is so complex or unique that it can be performed only by an individual with a B.S.N. degree, as required to qualify it as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

As for the third alternative criterion of a specialty occupation, the record indicates that the proffered position is newly created. Therefore, the petitioner cannot demonstrate that it normally requires a B.S.N. degree or its equivalent for the position. Accordingly, the position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Lastly, the proffered position does not meet the fourth alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the record does not establish that the duties of the subject position are so specialized and complex that baccalaureate level knowledge in a specific specialty is required to perform them. The record does not show that the duties of the proffered position are so specialized or complex that they could not be performed by an experienced individual with A.D.N. level knowledge in nursing.

For the reasons discussed above, the record does not establish that the proffered position meets any of the criteria set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify as a specialty occupation. The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

With respect to the beneficiary's qualifications to perform the services of a specialty occupation, counsel asserts that a critical care nurse, unlike a regular registered nurse, does not require a state license. Counsel cites no authority and provides no evidentiary support for its claim. Mere assertions by counsel will not satisfy the petitioner's burden of proof. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). California, the state of intended

employment, requires nurses to be licensed. *See Handbook, id.*, at 302. The record indicates that the beneficiary does not have a license, or a temporary license, from the State of California to practice nursing. Nor is there any evidence that the beneficiary is allowed by the State of California to practice nursing under the supervision of a licensed senior or supervisory nurse. The AAO determines, therefore, that the beneficiary has not complied with the requirements for licensure set forth in section 214(i)(2)(A) of the Act, 8 U.S.C. § 1184(i)(2)(A), and the regulations at 8 C.F.R. § 214.2(h)(4)(v)(A)(A), (B), and (C), *supra*.

In accordance with 8 C.F.R. § 103.2(b)(12) a petitioner must establish that the beneficiary was eligible for a requested benefit at the time the petition was filed. *See also* 8 C.F.R. § 214.2(h)(4)(iv)(A), which provides that “[a]n H-1B petition involving a specialty occupation shall be accompanied by . . . required evidence sufficient to establish that the beneficiary *is qualified* to perform services in a specialty.” [Emphasis added.] A visa petition may not be approved at a later date based on a set of facts not present at the time of filing. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Since the beneficiary was not licensed to practice nursing at the time the H-1B petition was filed on October 8, 2003, she was not qualified to perform the services of the specialty occupation. Accordingly, the beneficiary is ineligible for H-1B classification pursuant to the instant petition.

Thus, the record fails to establish that the proffered position is a specialty occupation or that the beneficiary is qualified to perform the services of a specialty occupation.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director’s decision denying the petition.

ORDER: The appeal is dismissed. The petition is denied.