

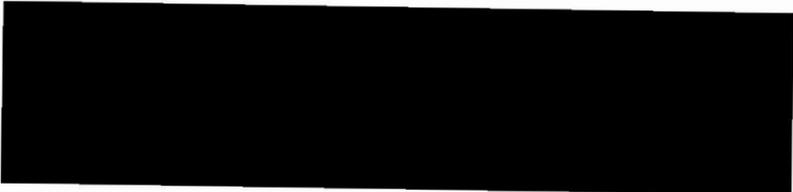


U.S. Citizenship  
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FILE: EAC 02 196 53072 Office: VERMONT SERVICE CENTER Date: **MAY 09 2006**

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, Chief  
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 sub-acute care facility that seeks to employ the beneficiary as a head 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 on the grounds that the proffered position is not a specialty occupation. On appeal, former counsel submits a brief and previously submitted evidence.<sup>1</sup>

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.

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<sup>1</sup> 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.

The record of proceeding before the AAO contains: (1) the 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) the 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 head nurse. 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 May 16, 2002 letter, the beneficiary would plan, direct, and supervise nursing care in the unit; supervise the administration of tests and treatments and procedures and participate in ongoing nursing research; evaluate, assess, and plan nursing care of patients; have responsibility for supervising 50 subordinates (including at least 2 registered nurses, 2 licensed practical nurses, 15 certified nursing assistants, and nurses aides); report to the director of nursing; prepare documents and records that are necessary for the unit; keep current with developments in the field; and where practical, assist with education and training of nursing staff. The beneficiary is responsible for satisfying state, federal, local, and facility standards and guidelines in the day-to-day functioning of the units under her control. The petitioner states that its organizational chart shows the head nurse below the nursing supervisor and above the charge nurses, which are supervised by the head nurse. For the proposed position the petitioner asserts that it requires a baccalaureate degree or its equivalent in nursing. The petitioner further asserts that the beneficiary is entitled to immediately work under the terms of her limited permit.

The director found that the proposed position parallels that of a registered nurse (RN) as that occupation is depicted in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*). The director found unpersuasive the assertion that the nursing industry distinguishes "entry-level" RNs from "professional" RNs, and that the proposed position is specialized, complex, or unique within the nursing industry. 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. 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 or diploma is incapable of performing the duties of a head nurse. According to the director, although the beneficiary has only now obtained a license to practice as an RN in New York, the record reflects that the petitioner offered the proposed position to persons who do not hold a license as an RN. The nature and scope of the position are altered, the director stated, because the petitioner endorses the use of a limited permit to carry out the proposed duties. The director found it impractical and unreasonable that a holder of a limited permit (which is not RN licensure), would be responsible for an RN nursing staff's supervision, clinical care procedures training, professional development, and performance evaluation; the director thereby concluded that the actual job duties of the offered position would not be more specialized than those of an RN. The director concluded that the nature of the proposed position is not so specialized, complex, or unique that only a person with a degree can perform the job. The director found the evidence relating to the November 27, 2002 memorandum<sup>2</sup>, the Department of Veterans Affairs (VA), and

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<sup>2</sup> 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

the American Association of Colleges of Nursing (AACN) unpersuasive in establishing the proposed position as a specialty occupation. 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, Office of Professions, states that an RN must hold at least a two-year degree or diploma from an acceptable program in general professional nursing. The director gave little weight to the letter from [REDACTED]. The director concluded that the petitioner does not normally require a bachelor's degree in a specific specialty for the proposed position, and discussed *Defensor v. Meissner*, 201 F.3d. 384 (5<sup>th</sup> Cir. 2000).

On appeal, former counsel refers to H-1B approval notices, the description of the proposed position, a CIS memorandum, the letter from [REDACTED] the study from the *Journal of the American Medical Association (JAMA)*, information about nursing programs, the press release from the AACN, the *Handbook*, and evidence relating to the VA to establish the proposed position as a specialty occupation.

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.

Counsel claims 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 35 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 2006-2007 edition of 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)).

Former counsel asserts that the nurse memo states that under certain circumstances administrative nurses, such as an upper-level "nurse manager" in a hospital administration position, may qualify for H-1B status. According to counsel, a supervisory-level nurse is an RN with a bachelor of science degree in nursing (B.S.N.) or health administration. Counsel maintains that the position offered here corresponds to an upper-level nurse manager and an upper-level supervisor, thereby qualifying it as a specialty occupation.

The AAO disagrees with former counsel's assertion that the nurse memo evinces that the offered position is an administrative nursing position. The nurse memo indicates that nursing services administrators hold an RN and a graduate degree in nursing or health administration. The nurse memo states:

Nursing [s]ervices [a]dministrators are generally supervisory level nurses who hold an RN, and a graduate degree in nursing or health administration. (See Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook at 75.)

The position offered here is not similar to an administrative nursing position. For the proposed position, the petitioner requires a B.S.N., which is not a graduate degree in nursing or health administration as described in the nurse memo. Further, the petitioner accepts a limited permit, which does not correspond to the higher standard of licensure as an RN. The AAO notes that former counsel contends, on page 9 of the appeal, that the petitioner requires that the candidate be "[I]icensed currently in the [S]tate of New York." His contention is inconsistent with the petitioner's May 16, 2002 letter, however. The petitioner's letter conveys that a limited permit is acceptable for the offered position. 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); and the statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS vs. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

On page 11 of the appeal, counsel states that a limited permit, not licensure as an RN, is all that is required in order to perform the proposed position and that the petitioner has been bringing supervisory nurses into the United States on limited permits for many years. Counsel contends that the nurse memo does not discuss permanent licensure. The AAO notes that the record contains the document entitled "Office of the Professions, New York State Education Department," which relates to licensure as an RN. This document states that a limited permit authorizes:

[T]he practice of licensed practical nursing or registered professional nursing under the immediate and personal supervision of a licensed, currently registered professional nurse, with the endorsement of the employer.

It further states that an “applicant for a limited permit must have completed all other requirements for licensure except the licensing examination.” The document conveys that “[a]ll applicants for licensure in registered professional nursing and/or licensed practical nursing must pass an acceptable licensing examination.” Based on this evidence, the proposed duties would be carried out by a person who has not passed the licensing examination, and who is required to perform the offered position under the immediate and personal supervision of a licensed, currently registered RN. Given the difference in the petitioner’s qualifications requirements from those described in the nurse memo, the AAO finds that the beneficiary’s position is neither an upper-level nurse manager nor an upper-level supervisory job.

The *Handbook*, a resource that CIS often looks to when determining the qualifications for particular occupations, supports the nurse memo’s information. The *Handbook* describes the training and educational requirements for RN positions as follows:

There are three major educational paths to registered nursing: A bachelor’s of science degree in nursing (BSN), an associate degree in nursing (ADN), and a diploma. . . . Generally, licensed graduates of any of the three types of educational programs qualify for entry-level positions as staff nurses.

Many RNs with an ADN or diploma later enter bachelor’s programs to prepare for a broader scope of nursing practice. . . .

Individuals considering nursing should carefully weigh the advantages and disadvantages of enrolling in a BSN program, because, if they do, their advancement opportunities usually are broader. In fact, some career paths are open only to nurses with a bachelor’s or master’s degree. A bachelor’s degree often is necessary for administrative positions and is a prerequisite for admission to graduate nursing programs in research, consulting, and teaching, and all four advanced practice nursing specialties—clinical nurse specialists, nurse anesthetists, nurse midwives, and nurse practitioners. Individuals who complete a bachelor’s receive more training in areas such as communication, leadership, and critical thinking, all of which are becoming more important as nursing care becomes more complex. Additionally, bachelor’s degree programs offer more clinical experience in nonhospital settings. . . .

All four advanced practice nursing specialties require at least a master’s degree. Most programs last about 2 years and require a BSN degree and some programs require at least 1 to 2 years of clinical experience as an RN for admission. In 2004, there were 329 master’s and post-master’s programs offered for nurse practitioners, 218 master’s and post-master’s programs for clinical nurse specialists, 92 programs for nurse anesthetists, and 45 programs for nurse midwives. Upon completion of a program, most advanced practice nurses become nationally certified in their area of specialty. In some States, certification in a specialty is required in order to practice that specialty.

In management, nurses can advance to assistant head nurse or head nurse and, from there, to assistant director, director, and vice president. Increasingly, management-level nursing positions require a graduate or an advanced degree in nursing or health services administration.

The 2006-2007 edition of the *Handbook* reveals that the proposed duties are not those of a nurse administrator as managerial nursing positions require an RN and increasingly, a graduate or an advanced degree in nursing or health services administration. The proposed position does not have the educational or licensure requirement of a management level nursing position.

Moreover, although the *Handbook* reports that a baccalaureate degree often is necessary for administrative positions, because the offered position does not require licensure as an RN, which is what the *Handbook* reports is a requirement for an administrative position, it would not correspond to an administrative RN position.

Based on the *Handbook's* information and the evidence in the record, the AAO finds the position presented here does not parallel that of a management-level or supervisory-level nursing position, which are occupations that may require at least a B.S.N. In consequence of that, the offered position would not require a baccalaureate or higher degree or its equivalent in a specific specialty as the normal minimum requirement for entry into the particular position, which is the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Former counsel asserts that the *Handbook* conveys that the three major paths to becoming an RN lead to entry-level nursing positions; that the offered position here is not entry-level; and that the nurse memo indicates that it is not a typical RN position. In light of the described requirements for the proposed position, which are a B.S.N. and a limited permit, the *Handbook* shows that the beneficiary's position does not correspond to that of a management-level or supervisory-level nursing position. As such, the offered position would not require a B.S.N. or a graduate degree in nursing or health administration.

Former counsel states that a B.S.N. or its equivalent is required for the proposed position:

Few, if any of the nurses with such positions in an upper-level administrative or supervisory position received those positions without many years of experience, certainly enough to make their education, under Service regulations, baccalaureate equivalent.

The contention that the proposed position requires a B.S.N. or its equivalent is unpersuasive. 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 degree programs specifically

tailored 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 submitted evidence fails to establish the requirement of a B.S.N. for entry into the proposed position. The VA document "Nurse Qualification Standard" revised the policy standard for persons appointed as RNs; however, this evidence does not establish that the position that is offered here requires at least a B.S.N. For instance, Appendix B of the VA 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 reports 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 offered position parallels. The *JAMA* article does not address the educational requirements of an RN; it discusses the patient-to-nurse ratio in hospitals. The submitted information about college degree programs in nursing is not persuasive in establishing the proposed position requires a B.S.N. The AAO has determined that the position offered here does not parallel a management-level or supervisory-level nursing position. The AAO notes that the *Handbook* clearly states that a B.S.N. is not required for an RN such as a critical care nurse. The AAO's conclusion, from the referenced evidence, is that the petitioner fails to establish 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): a baccalaureate or higher degree or its equivalent in a specific specialty 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.

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. For the reasons discussed at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) 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, and that the director must recognize qualifying work experience as the equivalent of study towards the baccalaureate degree requirement. The AAO has explained earlier in this decision that CIS considers educational equivalency only when a specific degree does not exist in an occupational field. With the situation here, the *Handbook* reveals there are specific nursing degree programs; CIS will therefore not consider educational equivalency in determining whether the position offered here qualifies as a specialty occupation. No independent evidence in the record reflects that the petitioner has a

past practice of normally requiring a B.S.N. for the proposed position. As such, the petitioner fails to establish this criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

To establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) the petitioner must show that the nature of the specific duties is so specialized and complex that the knowledge required to perform such duties is usually associated with the attainment of a baccalaureate or higher degree. The AAO has already discussed the evidence in the record (the VA document, the *JAMA* article, the *Handbook*, the college degree programs in nursing, and the AACN press release) and its failure to establish that the offered position requires a B.S.N. The letter in the record from the [REDACTED] also fails to establish a B.S.N. requirement for the proposed [REDACTED] does not state that a B.S.N. is required for a position such as the one offered here. In the letter [REDACTED] states:

The graduates we have recently come to know who have the BSN degree have demonstrated that they have the capacity to become the nurse-managers and supervisors we are looking for while showing the responsible, caring characteristics our patients need.

For the reasons discussed at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), the petitioner fails to establish this last criterion at 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.

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.