



U.S. Citizenship
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FILE: EAC 02 242 53548 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 hospital that seeks to employ the beneficiary as a registered nurse (RN). 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 (1) the proffered position is not a specialty occupation; and (2) the beneficiary is not qualified to perform a specialty occupation. On appeal, former counsel submits a brief and previously submitted evidence.¹

The AAO will first address the director's conclusion that the proposed position fails to qualify as a specialty occupation.

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.

¹ 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.

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) 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 an RN. 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 March 11, 2002 letter, the beneficiary would perform duties that entail caring for patients in the surgical intensive care unit (SICU). The petitioner stated that, except for attending meetings, classes, and performing preparatory work, the beneficiary would spend all of her time there. For the proposed position the petitioner asserts that it requires a baccalaureate degree or its equivalent in nursing.

The director concluded that the nature of the proposed position is not so specialized, complex, or unique that only an individual with a degree can perform the job; and that it is not evident that a baccalaureate or higher degree is usually associated with the proposed duties. The director found unpersuasive the petitioner’s assertion that the nursing industry distinguishes “non-specialized” RNs from “specialized” RNs, and that the proposed position is specialized, complex, or unique within the nursing industry. The Department of Labor’s (DOL) *Occupational Outlook Handbook* (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 degree or diploma is incapable of performing the duties of an RN who is assigned to a particular unit in a hospital. The director found the evidence relating to the Department of Veterans Affairs (VA) and 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 concluded that the petitioner does not normally require a bachelor’s degree in a specific specialty for the proposed position, and rejected the petitioner’s assertion that registered nursing experience is equal to bachelor’s level studies. The director discussed the decision in *Defensor v. Meissner*, 201 F.3d. 384 (5th Cir. 2000). Finally, the director stated that the beneficiary is not qualified for the proposed position.

On appeal, former counsel refers to H-1B approval notices, the description of the proposed position, CIS memoranda, letters from independent medical experts, a *Journal of the American Medical Association*

(*JAMA*) study, information about nursing programs, a 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.

The petitioner's March 11, 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 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 *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 since the November 27, 2002 memorandum² (the nurse memo) states that nursing specialties such as critical care and peri-operative (operating room) nurses require a higher degree of knowledge and skill than a typical RN or staff nurse position, the proffered position qualifies as a specialty occupation: it is a critical care and specialty nursing position that involves working in the operating room.

² 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).

Former counsel's assertion does not prevail in establishing the proffered position as a specialty occupation, however. The nurse memo acknowledges 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. 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.³

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. Although 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. The 2006-2007 edition of the *Handbook* reveals that the proposed duties closely resemble those of an RN, particularly a critical care nurse, which is an occupation that is depicted in the *Handbook* as working in critical or intensive care hospital units and providing care to patients with cardiovascular, respiratory, or pulmonary failure.

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. Often, they can find a staff nurse position and then take advantage of tuition reimbursement benefits to work toward a BSN by completing an RN-to-BSN program. In 2004, there were 600 RN-to-BSN programs in the United States. Accelerated master's degree programs in nursing also are available. These programs combine 1 year of an accelerated BSN program with 2 years of graduate study. In 2004, there were 137 RN-to-MSN programs.

³ It is worth noting that the nurse memo also mentions that certification examinations are available to such RNs who may work in such nursing specialties and possess additional clinical experience, but who are not advanced practice nurses.

...
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.

Based on the *Handbook's* information, an RN does not require a bachelor of science degree in nursing (B.S.N.). Inasmuch as the record reflects that the proposed position resembles an RN, it also does not require a B.S.N.

Former counsel asserts that the *Handbook* conveys that the three major paths to becoming an RN lead to entry-level nursing positions. Counsel further asserts that the offered position is not an entry-level position and that the nurse memo indicates that it is not a typical RN position. The assertions are not convincing. The proposed duties parallel those of a critical care nurse as that occupation is described in the *Handbook*, and the *Handbook* reports that such an occupation does not require a bachelor's degree in a specific specialty. The AAO has already stated that although the nurse memo acknowledges 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, nonetheless, the mere fact that a nursing position has a title such as "critical care" does not necessarily signify it qualifies as a specialty occupation.⁴

According to former counsel, a B.S.N. or its equivalent is required for the proposed position, and he states:

⁴ The AAO has already noted that the nurse memo also mentions that certification examinations are available to RNs who work in such nursing specialties and possess additional clinical experience, but who are not advanced practice nurses.

Few, if any of the nurses with such positions in an [o]perating [r]oom received those positions without many years of experience, certainly enough to make their education, under Service regulations, baccalaureate equivalent.

Counsel's contention that the proposed position requires a B.S.N. or its equivalent lacks substance. 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 that the proposed position requires a B.S.N. as 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 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 previously discussed in this decision.

The AAO acknowledges that page 16 of the appeal states that the petitioner's response to the request for evidence included "industry job announcements"; however, the record does not contain the referenced job announcements.

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. The

offered position parallels a critical care nurse, which is an occupation the *Handbook* describes as not requiring a baccalaureate degree in a specific specialty. Based on the evidence in the record and the *Handbook's* information, the proposed position does not have a uniqueness or complexity that would normally require a B.S.N. Consequently, the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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. 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 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 them is usually associated with the attainment of a baccalaureate or higher degree. The evidence in the record, the VA document, the *JAMA* article, the *Handbook*, the college degree programs in nursing, and the AACN press release, do not reflect that the offered position requires a B.S.N. The two letters in the record from "independent medical experts" also fail to establish a B.S.N. requirement for the proposed position. The expert opinion letters use nearly identical language, suggesting that they are written by the same unidentified third party and not by the signatories of the letters. Although the AAO acknowledges that the individuals have endorsed the petitioner's position regarding the requirement of a B.S.N., the letters are essentially identical; their evidentiary weight is therefore diminished. CIS may, in its discretion, use as advisory opinions statements submitted 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). The referenced evidence, therefore, fails to establish this last criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO disagrees with former counsel's assertion that CIS approves H-1B classification for beneficiaries seeking RN positions in North Dakota, while discriminatorily denying this classification to beneficiaries seeking RN positions in Pennsylvania. Former counsel states that since an RN position in the two states have the same specialized and complex duties, their positions should be specialty occupations. This assertion is not persuasive. According to the nurse memo, the National Council on State Boards of Nursing (NCSBN) confirmed that North Dakota is the only state that required a B.S.N. as a condition for licensure as an RN; the nurse memo conveys that when a B.S.N. is a prerequisite for practicing in the field, the position qualifies as a specialty occupation. Although the nurse memo states that "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, North Dakota no longer requires a B.S.N. for licensure by examination. Now, North Dakota is required to

“adopt rules establishing standards for the approval of out-of-state nursing education programs,” which may include non-B.S.N. nursing education. Section 43-12.1-09 of the North Dakota Nurse Practices Act. As a consequence, an RN position in North Dakota is no longer automatically considered an H-1B position because the degree requirement no longer exists; the assertion that CIS discriminates against beneficiaries seeking RN positions in Pennsylvania is moot, therefore.

Former counsel claims that CIS is requiring the petitioner to establish all four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). In denying the petition, the director did not indicate that the petitioner must establish all four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The denial letter reflects the director as considering the submitted evidence and the proposed duties in determining whether the petitioner established any one of the four criteria outlined at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

The director concluded that the beneficiary is not qualified to perform the services of the proposed position. Since the proposed position fails to qualify as a specialty occupation, the AAO finds that it is inconsequential to determine whether the beneficiary is qualified to perform the position. We do note that no evidence in the record reflects that the beneficiary holds licensure as an RN and that the beneficiary is thus not qualified to perform the duties of a nurse.

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.