



U.S. Citizenship  
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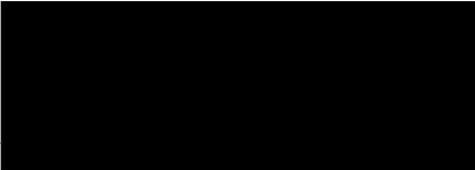


FILE: EAC 04 160 51114 Office: VERMONT SERVICE CENTER Date: DEC 13 2007

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, 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 medical facility that seeks to employ the beneficiary as a registered 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 basis of his determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). On appeal, counsel contends that the director erred in denying the petition, and that the proposed position qualifies for classification as a specialty occupation.

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.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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 proposed position.

The petitioner is a medical facility that claims 250 employees and gross annual income of \$21 million. In the Form I-129 and certified labor condition application (LCA), the petitioner titled the proposed position as that of a registered nurse. At Part 5 of the Form I-129, where the form asks for a "nontechnical description" of the proposed job duties, the petitioner stated "RN," and at Section 1 of the H Classification Supplement to the Form I-129, where the form asks for a further description of the proposed duties, the petitioner stated "Registered Nurse." No further duties were provided at the time of filing.

In its January 7, 2005 response to the director's request for additional evidence, the petitioner stated that the duties of the proposed position would include reviewing quality standards of nursing care and suggesting changes in the petitioner's nursing organization and administrative procedures; analyzing existing policies relating to nursing techniques and recommending modifications when needed; developing and carrying out staff education programs; providing assistance in developing guide and manuals for specific aspects of nursing services; preparing educational materials and assisting in planning and developing health and educational programs; advising the petitioner's management regarding services available through community resources; consulting with nursing groups concerning professional and educational problems; participating in surveys and research studies; developing standards and procedures for providing nursing care and for evaluating service; providing orientation, teaching, and guidance to staff to improve the quality and quantity of service; evaluating the performance of personnel and interpreting nursing standards to staff, advisory boards, nursing committees, and community groups; recommending duty assignments of nursing personnel, and coordinating services with other health and social agencies to render the program more effective; reviewing, evaluating, and interpreting nursing records, vital statistics, and other data affecting health services in order to assess community needs and to plan and implement programs to meet these needs; assisting in the planning of educational programs for nurses, related professional workers, and community groups to meet the needs of personnel and practitioners; assisting in the preparation of the operating budget; and participating in field research, studies, and investigations related to the improvement of nursing care. The petitioner emphasized that the proposed position is not an entry-level position, and that it does not include the delivery of patient care.

In determining whether a proposed position qualifies as a specialty occupation, Citizenship and Immigration Services (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. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

Although titled "registered nurse," the petitioner claimed in its response to the director's response for additional evidence that the duties of the proposed position are similar to those of medical and health

services managers, as those occupations are discussed in the *Handbook*. The *Handbook* states that the general requirement for a health services manager is a master's degree, but that a bachelor's degree is adequate for some entry-level positions in smaller organizations and at the departmental level within healthcare organizations; it also states, "[p]hysician's offices and some other facilities may substitute on-the-job experience for formal education." Thus, in some instances, a health services manager is not a specialty occupation.

However, the AAO does not agree with the parallel that counsel has drawn between the two positions, as the beneficiary would be in a subordinate position to the director of nursing and the assistant director of nursing. The AAO finds that the medically-related knowledge required by the duties of the proposed position combine those of nurse administrators and nurse informaticists, as those positions are described in the *Handbook*. Moreover, the AAO notes the *Handbook's* specific finding that some nurses have "little or no patient contact." According to the *Handbook*:

Some nurses have jobs that require little or no direct patient contact . . . *Nurse administrators* supervise nursing staff, establish work schedules and budgets, and maintain medical supply inventories . . . *Nurse informaticists* collect, store, and analyze nursing data in order to improve efficiency, reduce risk, and improve patient care.

Accordingly, the AAO next turns to the *Handbook's* description of the educational qualifications necessary for entry into the field.

With respect to the educational requirements for such positions, the *Handbook* indicates that there are three alternative paths for registered nurses generally. 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 a diploma program, usually three years, at a hospital. 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. An educational attainment lower than a bachelor's degree may suffice for many positions. Certain advanced practice nurses, the *Handbook* notes, have educational and clinical requirements beyond those generally applicable to all RNs. However, there is no indication in the *Handbook* that head nurses or nurse supervisors, though their duties may exceed those of some other registered nurses, require a B.S.N. as a minimum degree requirement for entry into such a position. Rather, it would appear that a two-year associate degree in nursing is often sufficient educational background. According to the *Handbook*, therefore, a baccalaureate or higher degree in the specific specialty of nursing – *i.e.*, a B.S.N. – is not the minimum requirement for entry into the position proffered by the petitioner, as required to meet the first criterion of a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

A policy memorandum issued by the legacy Immigration and Naturalization Service in November 2002 (the nurse memo)<sup>1</sup> provides additional guidance for the adjudication of H-1B petitions for nursing positions. In surveying the educational requirements for the nursing occupation, the nurse memo 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.). Although a four-year B.S.N. can be earned at some U.S. and foreign universities, the

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<sup>1</sup> Memorandum from [REDACTED], 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).

degree is not required for most entry-level nursing positions in the United States. The nurse memo 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 nurse memo – require a B.S.N. or higher degree, making them specialty occupations.

The position at issue in this petition does not fit any of the foregoing examples of nursing positions that would require a B.S.N. or higher degree. While the proposed position may involve some first-line supervision of nurses or other healthcare aides, such duties would not enhance the position to that of an upper-level nurse manager as referenced in the nurse memo. Accordingly, the AAO determines that a baccalaureate or higher degree in nursing or a related specialty is not the normal minimum requirement for entry into the proposed position, as required for it to meet the first criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner’s industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. The information submitted by counsel on appeal does not satisfy this prong. For example, counsel on appeal looks to the *Handbook*, which states the following:

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.

However, a finding that a bachelor’s degree broadens one’s career prospects or that some employers prefer a degree is not synonymous with a finding that such a degree is required, and does not demonstrate that a degree requirement is common to the industry.

Nor is the information from the American Associates of Colleges of Nursing (AACN) persuasive. The AACN information does not establish the petitioner’s degree requirement as common to the industry. Rather, the AACN information state why bachelor’s degrees are beneficial to the holders of those degrees as well as to their employers and patients. The excerpt from *The Princeton Review* states that a B.S.N. is necessary for “some” supervisory positions; it does not articulate an industry standard.

The petitioner has submitted no evidence, such as employment advertisements, letters from competitors, industry data, or any other objective evidence to demonstrate that its degree requirement is common to the petitioner's industry. Again, industry preferences are not synonymous with industry requirements. The petitioner has not satisfied the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them.

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The nature of the duties of the proposed position as set forth in the petition does not support such a finding, as they are similar to those of nurse administrators and nurse informaticists as discussed in the *Handbook*, which do not require a bachelor's degree. The record contains no documentation to support a finding that the proposed position is more complex or unique than nurse supervisor positions at other, similar organizations.

Therefore, the petitioner has not established that the proposed position qualifies as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. However, no such evidence has been presented.

The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The petitioner has not satisfied 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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

To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent. There is no information in the record to support a finding that the proposed position is more specialized and complex than the general range of nurse supervisor positions for which the *Handbook* indicates no requirement for the highly specialized knowledge associated with at least a

bachelor's degree. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO notes that the beneficiary is currently in H-1B status. However, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.2(b)(16)(ii). If the previous petition was approved based upon the same evidence contained in this record, its approval would constitute material 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 did approve a nonimmigrant petition similar to the one at issue here, 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).

The petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial. Accordingly, the AAO will 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.