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U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 02 242 53041 Office: VERMONT SERVICE CENTER Date: JUN 7 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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 documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

for Robert P. Wiemann, Director
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. 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and previously submitted evidence.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a registered nurse. Evidence of the beneficiary's duties includes: the Form I-129 [redacted] accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail, in part, caring for patients in the hospital's surgical intensive care unit who have had serious operations or serious medical problems, and who have also had complications caused by these problems. The letter stated that, except for attending meetings, education classes, and performing preparatory work, the beneficiary would spend all of her time there. The petitioner stated that a candidate must possess a bachelor's degree or its equivalent in nursing.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). In part, the director stated that it is well established that employers do not require a bachelor's degrees for a registered nurse position. The director stated that the title of a position will not automatically qualify the position as a specialty occupation. The director was not persuaded that the approved H-1B petitions establish that the proffered position qualified as a specialty occupation. The director noted that a very small number of registered nurses qualify in the H-1B classification, and further noted that the certified labor condition application indicated 45 available positions. The director found it unlikely that 45 registered nurses would work in positions considered far more advanced than the typical registered nurse. The director stated that an employer's degree requirement is insufficient to establish that a proffered position qualifies as a specialty occupation since every job would then qualify for the H-1B classification. Furthermore, the director stated that th[redacted]idence did not represent the entire industry. According to the director, over 50 percent of all registered nurses – including an operating room nurse - do not possess a four-year degree in nursing. The director further found that the proffered position's salary was low.

On appeal, counsel states that the proffered position qualifies as a specialty occupation, and counsel refers to [redacted]memorandum from the Office of Field Operations, prior H-1B approved petitions, three letters from alleged independent medical experts, [redacted] study, a press release, information about degree programs in nursing, and evidence fro[redacted]

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 36 approval notices. This record of proceeding does not, however, contain all of the supporting evidence submitted to the [redacted] the absence of all of the corroborating evidence contained in the record of their proceedings, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the petitions were parallel to the offered 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).

On [redacted] ssued a policy memorandum on H-1B nurse petitions (nurse memo), acknowledging 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.[1] However, 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.[2]

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. While 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. [redacted] 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 Department of Labor's [redacted] when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. The beneficiary's proposed duties closely resemble those described in the *Handbook* which portrays registered nurses as providing direct patient care by observing, assessing, and recording symptoms, reactions, and progress; assisting physicians during treatments and examinations; administering medications; and assisting in convalescence and rehabilitation. Hospital nurses, the *Handbook* states, are mostly staff nurses who provide bedside nursing care and carry out medical regiments. These nurses, the *Handbook* reports, are usually assigned to one area, such as surgery, maternity, or intensive care. As such, the proffered position's duty of caring for patients in the hospital's intensive and critical care units who have had serious operations or serious medical problems, and who have also had complications caused by these problems, would be performed by a registered nurse as delineated in the *Handbook*.

The *Handbook* states the following about the training and educational requirements for registered nurse positions:

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[1] Memorandum from [redacted]

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

> There are three major educational paths to registered nursing: associate degree in nursing (A.D.N.), bachelor of science [redacted] and diploma. . . . Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses.
>
> . . . .
>
> . . . [S]ome career paths are open only to nurses with bachelor's or advanced degrees. A bachelor's degree is often necessary for administrative positions, and it is a prerequisite for admission to graduate nursing programs in research, consulting, teaching, or a clinical specialization.

Thus, according to the *Handbook*, candidates for the offered position would not require a bachelor's degree for entry into the occupation.

The AAO finds that the evidence contained in the record fails to show that the petitioner established that a baccalaureate degree in a specific specialty is the minimum for entry into the occupation. The record shows that the petitioner had asserted that the VA has determined that registered nurse positions are specialty occupations because only candidates holding bachelor's degrees can occupy the positions. This assertion is weak. The VA document entitled "Nurse Qualification Standard," revises the policy on the qualification standard for all persons appointed as registered nurses, but it does not establish that a baccalaureate or higher degree or its equivalent is the normal minimum for entry into the offered position. For instance, Appendix B of the document does not elaborate on whether the grade of nurse I (levels 1-3), which require either associate's or bachelor's degrees in nursing, are registered nurse positions assigned to a hospital's surgery, emergency care, maternity, or intensive care unit[redacted]ress release reveals that the[redacted] and the[redacted]th innovative academic opportunities to obtain baccalaureate or higher degrees in a convenient setting. The press release, on page 2, states that only 31 percent of registered nurses hold bachelor's degrees, and 32 percent hold associate's degrees, plainly indicating that a bachelor's degree is not the minimum requirement for entry into the proffered position. Furthermore, the *Handbook* reveals that employers accept candidates with associate degrees in nursing, and the petitioner's advertisements do not state that it requires candidates for staff registered nurse positions to hold bachelor's degrees; however, the advertisements do state that candidates for management positions, such as nurse managers and assistant nurse managers, require bachelor of science degrees in nursing. Thus, based on the evidence in the record, the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a baccalaureate or higher degree or its equivalent is the normal minimum for entry into the particular position.

There is no evidence contained in the record that establishes the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations. Neither does the record contain evidence to establish that the particular position is so complex or unique that it can be performed only by a person with a degree.

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. There is no evidence in the record to demonstrate this criterion.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Counsel refers to the nurse memo to state that critical care nurse positions – such as the proffered position – require a bachelor's degree. Counsel claims that the submitted opinion letters from independent medical experts evince that the petitioner requires a bachelor's degree for the proffered position.

Counsel's statements and the submitted letters are not convincing. According to the nurse memo, 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. The two expert opinion letters are relevant, however, they have strikingly similar language in the following passages.

> Due to the increased complexity of medical care, caused in part by advances in medical technique, medicine and medical technology, registered nurses require far more education than previously in certain areas of the hospital. [Registered nurses in] these areas [of the hospital] require qualified nurses who possess, at the very minimum, a Bachelor of Science in Nursing (BSN) degree, with transcript[,] or the equivalent.
>
> I believe that the knowledge and ability required for a registered nurse to competently and adequately fill a responsible position in any of the above-referenced areas in this facility is no less than the education received in a baccalaureate program in an American university. A registered nurse with less education would require many years of specialized training in order to have the equivalent of a BSN and be able to adequately fill these positions.
>
> I have not received compensation for this letter. . . .

The two letters from "independent medical experts" seem fabricated given their nearly identical language. The individuals have, supposedly independently, written letters containing substantially identical passages. While we acknowledge that these individuals have endorsed the petitioner's position regarding the requirement for a bachelor's degree, the passages thereof appear to have been written by an unidentified third party. The exact wording, therefore, carries diminished weight, as it may not necessarily reflect the exact views of the person who signed it.

The article from the JAMA and the information about degreed nursing programs is irrelevant in establishing that the proffered position requires a bachelor's degree in nursing. The JAMA article merely discusses improving the nurse to patient ratio. [redacted] statement seems nearly identical for the associate of science and a bachelor of science degrees. The associate of science program prepares its graduates "with the knowledge and skills to provide direct care to individuals within the family and community context." Graduates are a "competent provider of nursing care, a conscientious

practitioner who practices within the legal and ethical parameters of nursing, and an accountable/responsible manager of care." Similarly, the bachelor of science graduate is "capable of practicing in a competing and responsible fashion as informed citizens in a dynamic and diverse society." According to the philosophy statement, the baccalaureate nursing education merely provides a "broad foundation in the sciences and liberal arts necessary for preparing professional nurses who are capable of practicing in a competent and responsible fashion as informed citizens in a dynamic and diverse society."

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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