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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 02 253 51568 Office: VERMONT SERVICE CENTER Date: JUN 7 2004

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 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] letter 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 intensive and critical care units 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 candidates seeking registered nurse positions are not required to hold bachelor's degrees because the duties and responsibilities are not so complex as to require a four-year baccalaureate degree in nursing. The director stated that [redacted] memorandum from the [redacted] of the Immigration and Naturalization Service did not claim that a position automatically qualifies as a specialty occupation because of its title such as intensive care unit nurse. The director did not find that the copies of the approved H-1B petitions were persuasive in establishing that the proffered position qualified as a specialty occupation. The director noted that the number of registered nurses that would qualify in the H-1B classification is a very small percentage of the total registered nurse population, and further noted that the certified labor condition application indicated 35 positions. The director found it unlikely that 35 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 inasmuch as every job would then qualify for the H-1B classification. Furthermore, the director stated that the [redacted] evidence did not represent the entire industry. According to the director, over 50 percent of all registered nurses – including medical intensive care nurse - do not possess a four-year degree in nursing. The director further found that the proffered position's salary was low and did not reflect the level of complexity and responsibility as described by the petitioner.

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

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 37 approval notices. This record of proceeding does not, however, contain all of the supporting evidence submitted to the

Vermont Service Center in the prior 37 cases. In 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).

If the other nonimmigrant petitions were approved based on identical facts that are contained in the current record, those approvals would be in violation of paragraph (h) of 8 C.F.R. § 214.2, and would constitute material and gross 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 [redacted] would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. [redacted]

The director raised his observation about the petitioner's certified labor condition application, and his commentary about the small percentage of registered nurses that would actually qualify in the H-1B classification because the initial evidence did not evince how the proffered position rose to the H-1B level.

The [redacted] memorandum acknowledged 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 director properly stated that 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.

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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.

CIS often looks to the Department of Labor's *Occupational Outlook Handbook* (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 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:

> There are three major educational paths to registered nursing: associate degree in nursing (A.D.N.), bachelor of science degree in nursing (B.S.N.), and diploma. . . . Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses.
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> . . . .
>
> . . . [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. For example, 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. However, the petitioner's assertion is weak. In the first place, 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 units. 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), namely, 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. [redacted] article merely discusses the patient-to-nurse ratio in hospitals. 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 th[redacted] memorandum 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 they believe that the petitioner requires a bachelor's degree for the proffered position.

Counsel's statements and the submitted letters are not convincing. As already discussed, with respect to the [redacted] memorandum, 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. Moreover, the three expert opinion letters have nearly identical language.

> With the increased complexity of medical care - caused in part by advances in technique, medicine and medical technology - registered nurses require far more education than in the past with regard to certain areas of the hospital. These areas such as critical care units, including step-down units, intensive care units [redacted] telemetry units, surgical and medical ICUs, medical-surgical units, etc., require qualified nurses who possess, at the very minimum, a Bachelor [redacted] with transcript, or the equivalent.
>
> Registered nurses filling postings in the following areas of the hospital are filling positions in specialty occupations. These positions require the registered nurse to use the theoretical and practical application of highly specialized knowledge attained in a baccalaureate nursing program, 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 [redacted] equires no less than the education received in a baccalaureate program from a fully accredited university. A registered nurse with less education would require many years of specialized training in order to have the equivalent of a BSN and adequately fill any of these positions.
>
> I have not received compensation for this letter. . . .

The three letters from "independent medical experts" seem contrived given their 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 AAO finds the article from th[redacted]nd the information about degreed nursing programs irrelevant in establishing that the proffered position requires a bachelor's degree in nursing. The article merely discusses improving the nurse to patient ratio.[redacted]philosophy 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.