

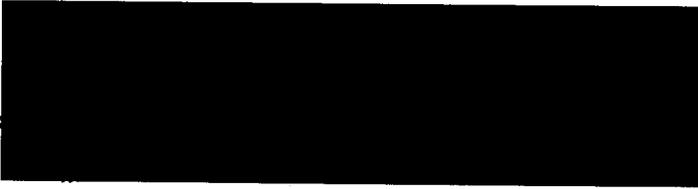
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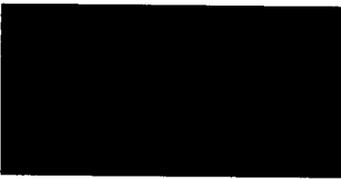
JUN 01 2005

FILE: [Redacted] Office: VERMONT SERVICE CENTER Date:

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, 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 skilled nursing facility that seeks to employ the beneficiary as a charge nurse/manager. 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 states that the proffered position qualifies as a specialty occupation, and submits previously submitted evidence.

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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) 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 charge nurse/manager. Evidence of the beneficiary's duties includes: the Form I-129 and the letter accompanying the Form I-129. According to this evidence, the beneficiary would perform duties that entail assisting in the planning, organizing, developing, and directing of nursing services as directed by the director of nursing; assisting in the evaluation of nursing personnel and setting goals; liaising between the patients, family, physician, and care team; planning, coordinating, and evaluating educational programs for staff; participating in quality assurance, safety, cost containment, and other committees as directed by the director of nursing; ensuring new employees are given an orientation of policies and procedures; coordinating with the director of nursing and the human resources department on hiring, counseling, and terminations; preparing weekly, monthly, and other reports as directed by the nursing director and executive director; assisting with customer service for patients and guests; performing periodic audits of training programs and hiring and promotion patterns; assisting the director of nursing in ensuring that license requirements are satisfied; assisting the director of nursing with infection control and conducting classes/training and in-service seminars regarding patient care; and serving as a resource to staff. The petitioner stated that a candidate must possess a bachelor of science in nursing (BSN).

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). Referring to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the director stated that it shows that a bachelor's degree is often necessary for administrative positions and for admission to a graduate nursing program in research, consulting, teaching, or a clinical specialization. The director concluded that the proffered position is not a senior level nurse administrator or an advanced practice nurse; that it does not require admission to a graduate nursing program in research, consulting, teaching, or a clinical specialization; and that the DOL does not indicate that the lack of a bachelor's degree precludes persons from performing duties that may involve first-line supervision. The director stated that because the petitioner did not submit the requested evidence regarding the number and types of employees to be supervised, the record did not establish that the proposed position is a senior-level administrative position requiring a bachelor's degree. Furthermore, the director stated that the petitioner did not furnish requested evidence regarding the educational credentials of persons presently or formerly in the position, and whether a bachelor's degree is the industry standard for the position. The director stated that the petitioner failed to document and explain the qualitative difference between the curriculum for a bachelor's degree in nursing and an associate degree in nursing. According to the director, the petitioner did not provide evidence that illustrated why a licensed nurse who graduated from an associate or diploma program is incapable of performing the duties of a registered nurse working as a charge nurse/manager. The director stated that the petitioner's perfunctory degree requirement will not disguise the fact that the position is not a specialty occupation. Furthermore, the director stated that CIS is not required to approve applications on the basis of a prior approval of a similar petition submitted on the beneficiary's behalf; that a copy of the approved petition and supporting documents were not in the record; and that is impossible to determine whether the petition had been approved in error or whether the facts and conditions have changed since its approval.

On appeal, counsel states that the proposed position qualifies 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 asserts that CIS has already determined that the proffered position is a specialty occupation since CIS has approved another, similar petition in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the instant H-1B petition is parallel to the prior petition. 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 petition was 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 petition 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 prior approvals do not preclude CIS from denying an extension of the original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL [REDACTED] 5th Cir. 2004).

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)).

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 *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.

The *Handbook* continues:

[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.

The *Handbook* does not elaborate on administrative nursing positions within this classification. The *Handbook* states the following about head nurses or nurse supervisors:

Head nurses or nurse supervisors direct nursing activities. They plan work schedules and assign duties to nurses and aides, provide or arrange for training, and visit patients to observe nurses and to ensure the proper delivery of care. They also may see that records are maintained and equipment and supplies are ordered.

A CIS policy memo provides the following commentary on administrative nursing positions: "Nursing Services Administrators 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.)"¹ The *Handbook* reference is to the classification of medical and health services managers; the *Handbook* states:

The term "medical and health services manager" encompasses all individuals who plan, direct, coordinate and supervise the delivery of healthcare. Medical and health services managers include specialists and generalists. Specialists are in charge of specific clinical departments or services, while generalists manage or help to manage an entire facility or system.

As stated in the denial letter, the petitioner's response to the request for evidence failed to furnish requested evidence on the number and type of employees to be supervised by the beneficiary. According to the regulation, the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). Absent the requested evidence, the AAO cannot perform a meaningful analysis of the proposed position's duties and determine whether they require baccalaureate-level education. Although the proposed position seems to

¹ 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).

resemble a nursing position beyond the entry-level registered nurse, it does not appear to be analogous to an administrative nursing position. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

It is important to note that the petitioner did not provide requested information on the Form I-129 petition: it did not disclose its current number of employees, gross and net annual income, and its year of establishment.

No evidence in the record relates to the second criterion at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(2), which requires that the petitioner demonstrate that a specific degree requirement is common to the industry in parallel positions among similar organizations.

No evidence establishes that the proffered position is so complex or unique that it can be performed only by a person with a degree. As already discussed, because the petitioner did not provide requested evidence about its staffing and business operations, the AAO cannot perform a meaningful analysis of the proposed position's duties and determine whether they require baccalaureate-level education.

No evidence demonstrates the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner establish that it normally requires a degree or its equivalent for the position. The approval notice submitted on appeal relates to another petitioner.

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 contends that the proposed position is managerial in nature; that the duties and responsibilities differ from an entry-level staff nurse or a registered nurse; and that the position requires expertise in management, clinical teaching, training, and study of specialized theories, which are absent in the associate degree in nursing program. Counsel states that the BSN provides skills to recognize and solve problems and establishes a basis for making clinical judgments without a direct physician or administrative supervision. In the absence of the director of nursing, counsel states that the charge nurse/manager serves as the assistant director of nursing. Due to recent developments in health care, counsel maintains that a licensed registered nurse is no longer qualified to perform the proposed position.

Counsel's assertions are not persuasive. As already discussed in this decision, because the petitioner did not provide requested evidence about its staffing and business operations, the AAO cannot perform a meaningful analysis of the proposed position's duties and determine whether they require baccalaureate-level education. Furthermore, counsel's claims about the BSN program are not substantiated by independent evidence. Without documentary evidence to support the claims, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO observes that counsel's statement that the beneficiary will act as the assistant director of nursing in the absence of the director of nursing is not reflected in the petitioner's job description. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

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.