

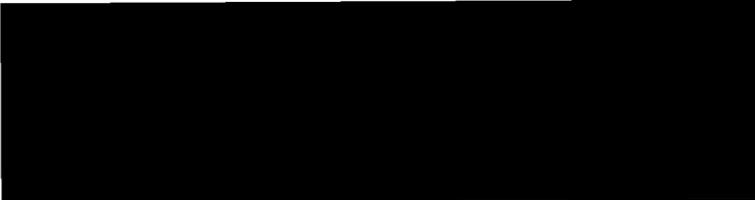
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FILE: EAC 02 191 54326 Office: VERMONT SERVICE CENTER Date: **MAR 27 2006**

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

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner was originally represented by counsel, [REDACTED]. On August 11, 2005, however, Mr. [REDACTED] was expelled from practice before U.S. Citizenship and Immigration Services pursuant to the regulation at 8 C.F.R. § 292.3(a)(1)(i). Accordingly, the petitioner is self-represented in this matter.

The petitioner is a hospital in the [REDACTED]. It seeks to employ the beneficiary as a registered nurse and to classify her 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 the record failed to establish (a) that the proffered position is a specialty occupation or (b) that the beneficiary is licensed to practice nursing in Pennsylvania and thereby qualified to perform services in 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.

As provided in 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.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2)(A) provides that an alien must have “full state licensure to practice in the occupation, if such licensure is required to practice in the occupation” in order to be qualified to perform the services of a specialty occupation. The licensure requirement is further explained in the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A), in pertinent part, as follows:

- A. *General.* If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien . . . seeking H classification in that occupation must have that license prior to approval of the petition to be found eligible to enter the United States and immediately engage in employment in the occupation.
- B. *Temporary licensure.* If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, and the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.
- C. *Duties without licensure.* In certain occupations which generally require licensure, a state may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, the director shall examine the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director’s request for evidence (RFE); (3) the petitioner’s response to the RFE; (4) the director’s decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner describes itself as a hospital, established in 1885, with 3,936 employees and gross annual income of \$1.23 billion. It proposes to hire the beneficiary as a registered nurse (R.N.) in its Medical Intensive Care Unit (MICU), where she would care for patients recovering from surgery, or who have post-surgical complications involving neurosurgery, trauma, and the like. In response to the RFE, in which the director requested a detailed description of the beneficiary’s duties and the number of hours required by each duty per week, the petitioner provided the following statement:

The beneficiary . . . will . . . spend virtually all of [her] time in medical intensive care units [MICU] . . . [with] the following responsibilities: caring for patients who have had serious operations or serious medical problems, and who have also had complications caused by these problems This work involves monitoring the newest of equipment, utilizing modern technology, and having a depth of knowledge as well as breadth of knowledge that would enable the nurse to recognize even small symptoms of future complication

[U]nlike a general ward, where the immediate failure to recognize slight changes of condition could result in minor problems in a patient, the patient in the MICU is in immediate peril of paralysis or death if even small changes in condition are not recognized and understood.

[L]ife in the MICU, for the registered nurse, is observing, on almost a minute-to-minute basis, a series of crises for anywhere from five to fifteen patients in the unit, and handling those crises in an appropriate and life-saving manner.

[T]he complexity of the heart, when considered in combination with the risk factors that could cause death or other catastrophic non-fatal impairments, requires that medical personnel tending it have the specialized depth of knowledge and experience to properly carry out their duties.

The minimum educational requirement for the proffered position, according to the petitioner, is a bachelor of science degree in nursing (B.S.N.). The record shows that the beneficiary received a B.S.N. from Angeles University, in the Philippines, on April 6, 2000, and that she was employed as a staff nurse, or medical-surgical nurse, by a hospital in the Philippines from May 2000 through May 2001.

The service center determined that the proffered position is not a specialty occupation. In the director's judgment, the nature of the position is not so specialized, complex, or unique that only an individual with a degree can perform the job, that a baccalaureate or higher degree is usually associated with the duties of the position, or that the proffered position is particularly specialized, complex, or unique within the nursing industry. No evidence was submitted that the nursing industry distinguishes "non-specialized" from "specialized" registered nurses, the director indicated, and the Department of Labor's *Occupational Outlook Handbook (Handbook)* makes no such distinction. Rather, the *Handbook* distinguishes more broadly between "registered nurses" and "advanced practice nurses," indicating that the latter must meet educational and clinical practice requirements beyond those of registered nurses. In the director's view, the petitioner failed to show why a licensed nurse who graduated from an associate or diploma program, rather than a four-year baccalaureate program, would be incapable of performing the duties of a registered nurse working in an intensive care unit. The director found that the record failed to show a B.S.N. degree is common to the nursing industry in parallel positions among similar organizations. The duties of the proffered position parallel those carried out by registered nurses working in hospitals, the director declared, positions for which the licensing authority in Pennsylvania does not require B.S.N. degrees. The *Handbook* does recognize that a B.S.N. is often necessary for administrative positions, the director pointed out, but the record in this case did not demonstrate that the duties of the proffered position fit the *Handbook's* description of a nurse administrator or advanced practice nurse, which would require a bachelor's degree. Position statements and opinion letters in the record from medical organizations and professionals were not persuasive evidence that a B.S.N. is the minimum educational requirement for the proffered position, the director stated. Finally, the director noted the lack of evidence that the beneficiary is a licensed registered nurse in Pennsylvania and immediately eligible to practice nursing in the state. Accordingly, the record failed to establish that the beneficiary is qualified to perform the services of a registered nurse.

On appeal counsel asserts that the proffered position is that of a critical care nurse, a type of nursing specialty that may require a higher degree of knowledge than a typical R.N. or staff nurse position, as

discussed in a memorandum of the legacy Immigration and Naturalization Service (INS) which provides guidance on the adjudication of H-1B petitions for registered nurses (*H-1B Memorandum*).¹ According to the *H-1B Memorandum*, a critical care nurse may require a B.S.N. degree, depending on the duties of the particular position, which would make it a specialty occupation. The duties of the critical care nursing position at issue in this petition are more specialized and complex than those of a typical registered nurse, counsel contends, and can only be performed by a nurse with the comprehensive educational background of a B.S.N. degree, thus making it a specialty occupation. As for the licensure issue, counsel acknowledges that the beneficiary does not have a nursing license or a temporary permit to practice nursing from the Commonwealth of Pennsylvania, and cannot take the state's licensing examination until she enters the United States.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook, supra*, as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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 also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, Inc. v. Reno, id.*, at 1165-66.

The occupation of registered nursing is described in the *Handbook*, 2006-07 edition, in pertinent part, as follows:

Registered nurses (RNs), regardless of specialty or work setting, perform basic duties that include treating patients, educating patients and the public about various medical conditions, and providing advice and emotional support to patients' family members. RNs record patients' medical histories and symptoms, help to perform diagnostic tests and analyze results, operate medical machinery, administer treatment and medications, and help with patient follow-up and rehabilitation.

....

RNs can specialize in one or more patient care specialties RNs may combine specialties from more than one area – for example, pediatric oncology or cardiac emergency – depending on personal interest and employer needs.

RNs may specialize by work setting or by type of care provided *Critical care nurses* work in critical care or intensive care hospital units and provide care to patients with cardiovascular, respiratory, or pulmonary failure

Most RNs work as staff nurses, providing critical health care services along with physicians, surgeons, and other health care practitioners

¹ Memorandum of 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).

As for the educational requirements of registered nurses, the *Handbook* indicates that there are three alternative paths. 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 the less frequent three-year diploma program at a hospital. *See id.* 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 at a hospital, or in a hospital's critical care unit. Less than a baccalaureate level education may suffice for many such positions. The *Handbook* also notes, however, that certain administrative positions, as well as advanced practice nurses (including clinical nurse specialists, nurse anesthetists, nurse midwives, and nurse practitioners), have educational requirements, such as a B.S.N. or a master's degree, which are beyond those generally applicable to registered nurses. *See id.* All 50 states and the District of Columbia require nurses to pass a national licensing examination, known as the NCLEX-RN. *See id.*

The *H-1B Memorandum* from the legacy INS in November 2002, referenced by counsel in the briefs, provides additional guidance for CIS on the adjudication of H-1B petitions for registered nurses. In surveying the educational requirements for the nursing occupation, the *H-1B Memorandum* 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.). Though a four-year B.S.N. can be earned at some U.S. and foreign universities, the degree is not required for most entry-level nursing positions in the United States. The *H-1B Memorandum* 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. Likewise, some nursing specialties – such as critical care, peri-operative, rehabilitation nursing, oncology, and pediatric nursing – may require a B.S.N. or equivalent knowledge. In addition, some nurses in high-level management positions – “such as an upper-level ‘nurse manager’ in a hospital administration,” according to the *H-1B Memorandum* – require a B.S.N. or higher degree, making them specialty occupations.

In determining the nature of a particular position, and whether it qualifies as a specialty occupation, the duties that will actually be performed are dispositive, not the title of the position. The petitioner must show that the duties of the position normally require a degree in a specialty. The critical issue is not the employer's self-imposed standard, 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 a minimum for entry into the occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000).

Though counsel asserts that the position at issue in this petition is a critical care “nursing specialty” within the contemplation of the H-1B Memorandum, requiring a B.S.N. degree, the duties described by the petitioner provide no details about the specific tasks the beneficiary would be performing that distinguish the position from a typical R.N. The petitioner identifies duties such as “caring for patients who have had serious operations or . . . medical problems . . . monitoring the newest of equipment, utilizing modern technology . . . observing on almost a minute-to-minute basis . . . five to fifteen patients . . . and handling th[eir] crises.” These broad and general duties accord with the information in the DOL *Handbook* about the tasks of registered nurses generally, including hospital nurses who are assigned to the facility's intensive care unit. They do not describe a position that requires specialized knowledge that can only be attained with a B.S.N. degree.

Counsel resubmits on appeal three letters from health professionals in Pennsylvania, initially submitted in response to the RFE, declaring that registered nurses filling critical care positions at the petitioner's facility and other hospitals require B.S.N. degrees. The letters discuss the petitioner's general need for more nurses in its emergency care units, but they do not discuss the particular position at issue in this petition or any of its specific duties. The letters do not explain that the duties of the proffered position could not be performed by an R.N. with less than a baccalaureate level of education, such as an A.D.N. Furthermore, all three letters, following some introductory information about each of the signatories, are virtually identical in their format and wording. Thus, it appears that the letters were not drafted by the individual authors, which lessens their evidentiary weight. CIS may, in its discretion, use as advisory opinions statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. When an opinion is not accord with other information or is in any way questionable, however, CIS is not required to accept or may give less weight to that evidence. *See Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm. 1988). The AAO determines that the opinion letters are not persuasive evidence that a B.S.N. or its equivalent is the normal minimum requirement for entry into the proffered position.

For the reasons discussed above, the proffered position does not meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Seeking to establish that the proffered position meets the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), counsel refers on appeal to a previously submitted announcement of the American Association of Colleges of Nursing (AACN), published in 1998, that it had entered into a partnership with the Veterans Administration (VA) to develop expanded opportunities for VA nurses to obtain B.S.N. and advanced degrees in nursing, with the goal of bringing all VA registered nurses to the B.S.N. level by 2005. The announcement says nothing about the educational requirements for registered nurses in the private sector, however, and the VA, as the director stated in his decision, does not represent the hospital industry as a whole and does not set the standards for the industry. Thus, the record does not establish that a B.S.N. degree is common to the petitioner's industry in parallel positions among similar organizations, as required for the proffered position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor has the petitioner demonstrated that its nursing position is so complex or unique that it can only be performed by an individual with a B.S.N. degree, as required for the proffered position to qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

With regard to the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the record indicates that the proffered position is newly created. The petitioner has submitted no documentation showing that it has previously required a B.S.N. degree or its equivalent for the position. Accordingly, the record does not establish that the petitioner normally requires a B.S.N. or its equivalent for the registered nurse position, as required for it to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Lastly, the proffered position does not meet the fourth alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the record does not establish that the duties of the subject position are so specialized and complex that baccalaureate level knowledge in a specific specialty is required to perform them. The record does not show that the duties of the proffered position could not be performed by an individual with less than a baccalaureate level knowledge of nursing.

Counsel asserts that the Vermont Service Center has approved numerous H-1B petitions for similar positions and duties. Counsel has not submitted any of the documentary materials from those cases, however, demonstrating that the positions are similar to the one proffered by the petitioner in this case. Mere assertions by counsel will not satisfy the petitioner's burden of proof. *See Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the AAO is never bound by a decision issued by a service center or a district director. *See 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). Only published precedent decisions are binding on all CIS employees in the administration of the Act. *See* 8 C.F.R. § 103.3(c). Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). Thus, any previously approved petitions in other cases have no legal bearing on the AAO's adjudication of the instant petition.

For the reasons discussed above, the record does not establish that the proffered position meets any of the criteria set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify as a specialty occupation. The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

With respect to the beneficiary's qualifications to perform the services of a specialty occupation, counsel acknowledges that the beneficiary has neither full nor temporary licensure from the Commonwealth of Pennsylvania to practice nursing. Nor is there any evidence that the beneficiary is allowed by Pennsylvania to practice nursing under the supervision of a licensed senior or supervisory nurse. The AAO determines, therefore, that the beneficiary has not complied with the requirements for licensure set forth in section 214(i)(2)(A) of the Act, 8 U.S.C. § 1184(i)(2)(A), and the regulations at 8 C.F.R. § 214.2 (h)(4)(v)(A)(A), (B), and (C), *supra*.

Under 8 C.F.R. § 103.2(b)(12) a petitioner must establish that it was eligible for a requested benefit at the time the petition was filed. *See also* 8 C.F.R. § 214.2(h)(4)(iv)(A), which provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by . . . required evidence sufficient to establish that the beneficiary *is qualified* to perform services in a specialty." [Emphasis added.] A visa petition may not be approved at a later date based on a set of facts not present at the time of filing. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Since the beneficiary was not licensed to practice nursing at the time the H-1B petition was filed on May 8, 2002, she was not qualified to perform the services of a specialty occupation. Accordingly, the beneficiary is ineligible for H-1B classification pursuant to the instant petition.

Thus, the record fails to establish that the proffered position is a specialty occupation or that the beneficiary is qualified to perform the services of a specialty occupation.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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