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U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 04 257 51873 Office: VERMONT SERVICE CENTER Date: **JAN 25 2009**

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 an elderly care service that seeks to employ the beneficiary as a part-time assistant nursing 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.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's requests for evidence (RFE); (3) counsel's responses to the director's requests; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

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

An 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) consistently interprets the term “degree” in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. 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 nor 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.

The petitioner seeks the beneficiary’s services as a part-time assistant nursing manager. Evidence of the beneficiary’s duties includes: counsel and the petitioner’s letters in support of the petition, dated July 20, 2004 and August 25, 2004, respectively, and counsel’s responses, dated April 5, 2005 and July 26, 2005, respectively, to the director’s RFEs. As stated by the petitioner, the proposed duties are as follows:

Assist in overseeing the clinical care of the assisted living facilities’ residents to maintain high standards of patient care, ensure proper and accurate administration of medication, provide consultation for residents and their family members, participate in the development of protocols for clinical care, work productively with all members of the team, and be responsible for the coordination of day-to-day activities.

In response to the director’s RFE, counsel further described the proposed duties as follows:

Conduct and assign workers; supervise tests, including glucose tests, and blood and urine analysis. Supervise the handling of specimens. Interpret data related to specimens and communicate with other specialists regarding test results. Prepare individualized care plans for the petitioner’s residents with other specialists. Perform staffing duties. Assist the director and current assistant manager in supervising all full-time staff and contract employees. Supervise

and coordinate with other contract employees, including physicians and nurses sent from other agencies. Perform all the duties at other facilities of the Himalayan Health Care System. Keep employee records and analyze wages, salaries, and facility expenses. Assist the manager plan, develop, and administer the petitioner's information system. Read and interpret all rules and regulations at the federal, state, and local levels. Assist in developing and implementing policies and procedures for documenting, storing, and retrieving information and for processing medical-legal documents in conformance with federal, state, and local statutes.

The director found that the proposed assistant nursing manager duties do not require a bachelor's degree. Citing the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel asserts, in part, that the proffered assistant nursing manager position is a specialized position as it bridges the expertise of two fields, nursing and management. Counsel also asserts that the Himalayan Health Care System, which has five facilities including the petitioner, has obtained eight visas for the same position as the proffered position.

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.

The AAO turns first to 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is a specialty occupation. The combination of nursing and management duties described by counsel on appeal is noted. Also noted is counsel's July 26, 2006 response to the director's May 1, 2005 RFE, in which counsel includes photocopies of the Medical and Health Services Managers category from the *Handbook*. The *Handbook*, 2006-07 edition, states:

The occupation, 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.

In this case, the petitioner has not demonstrated that the proffered position is an administrative position, which would require a registered nurse with a master's degree in nursing or health administration. Rather, the proposed duties are similar to those of a head nurse or nurse supervisor, as described herein. Furthermore, information on the petitioner's list of employees indicates that the beneficiary would be supervising employees holding an associate degree and/or a high school education. It is noted that the record contains no evidence in support of the petitioner's assertion that the beneficiary would be supervising "other contract employees, including physicians and nurses." Of further note, although information on the petition reflects that the petitioner was established in 1993, has five employees and a gross annual income of \$250,000, the record also contains no evidence in support of these claims such as federal income tax returns and quarterly wage reports. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The proposed duties are similar to those of a registered nurse position, as described in the *Handbook*, 2006-07 edition. In its *Handbook*, the DOL states the following about the training and educational requirements for registered nurse positions:

There are three major educational paths to registered nursing: a bachelor's of science degree in nursing (BSN), an associate degree in Nursing (A.D.N.), and a diploma. . . . Generally, licensed graduates of any of the three types of educational programs qualify for entry-level positions as staff nurses.

[S]ome career paths are open only to nurses with a bachelor's or master's degree. A bachelor's degree often is necessary for administrative positions, and it is a prerequisite for admission to graduate nursing programs in research, consulting, and teaching, and all four advanced practice nursing specialties – clinical nurse specialists, nurse anesthetists, nurse midwives, and nurse practitioners.

Some RNs start their careers as licensed practical nurses or nursing aides, and then go back to school to receive their RN degree. Most RNs begin as staff nurses, and with experience and good performance often are promoted to more responsible positions.

No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is normally required for a registered nurse job. In view of the foregoing, it is concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of the regulations. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Counsel's statement that the Himalayan Health Care System, which has five facilities including the petitioner, has obtained eight visas for the same position as the proffered position, is noted. This record of proceeding, however, does not contain all of the supporting evidence submitted to CIS in the prior cases. In the absence of all of the corroborating evidence contained in other records of proceeding, the information submitted by counsel is not sufficient to enable the AAO to determine whether the positions offered in the prior cases were similar to the position in the instant petition.

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 cases were similar to the proffered position or were approved in error, no such determination may be made without review of the original records in their entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petitions 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).

Regarding parallel positions in the petitioner's industry, the petitioner also submitted Internet job postings for assistant nurse manager positions. There is no evidence, however, to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. The advertisements are for nursing-related positions at hospitals/medical centers and at one of the nation's largest healthcare systems for children. The petitioner has not demonstrated that the proposed duties of the proffered position are as complex as the duties described in the advertised positions, such as managing the daily shifts of a 167-bed acute care community hospital, and assisting the nursing director in supervising the nursing department in the emergency department of a 669-bed regional care/teaching hospital. Thus, the advertisements are not probative.

The record also does not include any evidence from firms, individuals, or professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The duties that comprise the proffered position, such as "[assisting] in overseeing the clinical care of the assisted living facilities' residents to maintain high standards of patient care" and "ensur[ing] proper and accurate administration of medication," are routine to a registered nurse position and do not establish the position as sufficiently unique or sufficiently complex to require a bachelor's degree level of knowledge in a specific specialty. The petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. On appeal, counsel states that the Himalayan Health Care System, which has five facilities including the petitioner, has obtained eight visas for the same position as the

proffered position. The record contains the H-1B approval notice for the petitioner's employee, Corazon Cabo Ardivilla. The AAO, however, usually 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 to aid in determining the third criterion. Although the petitioner indicates it was established in 1993, the record does not contain a record of the petitioner's employment practices pertaining to all of its assistant nursing managers from its establishment in 1993, as well their educational histories. Without documentary evidence to support the claim, 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). Further, 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.<sup>1</sup> 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. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

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

As described, the proposed duties appear no more specialized and complex than those general duties which the *Handbook* attributes to the general occupational category of registered nurses, for which the *Handbook* does not indicate a normal requirement for usual association with at least a bachelor's degree in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation.

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<sup>1</sup> The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

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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.