PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 02 170 52971 Office: VERMONT SERVICE CENTER Date: APR 28 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 service center director 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 healthcare rehabilitation center that seeks to employ the beneficiary as a specialty registered nurse. The petitioner 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.

The issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

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), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

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

> [A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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) 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 proceedings 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) the Form I-290B with 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 in a healthcare rehabilitation center caring for "specialized" and "sub-acute" patients. Evidence of the beneficiary's duties includes: the I-129 petition with attached documentation; and the petitioner's response to the director's request for evidence. According to this evidence the beneficiary would: administer appropriate medical treatment and therapies to specialty patients with concentration on sub-acute and gerontological rehabilitation; read and interpret medical charts; review patient progress with medical personnel; and implement physician's instructions relating to various medical treatments. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in nursing (BSN).

The director found that the offered position did not qualify as a specialty occupation and failed to meet any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). The director noted that the offered position did not involve clinical specialization or nursing administration, and that the duties did not qualify at the H-1B level. The director further noted that according to the Department of Labor's *Occupational Outlook Handbook* (*Handbook*), registered nursing positions do not generally require a baccalaureate degree in nursing.

On appeal, counsel states that the petitioner provides specialized and sub-acute care, and that the requirement of a baccalaureate degree for such nurses is standard in the industry. Counsel asserts that the duties of the proffered position are so complex that a nurse without a minimum of a BSN, or its equivalent, is not qualified to fill the position. Counsel further states that all nurses in the petitioner's facility providing specialized and sub-acute care hold a minimum of a bachelor's degree in nursing.

The petitioner has not met any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify the offered position as a specialty occupation. The job responsibilities to be assigned to the beneficiary fall within the duties of a registered nurse. In the *Occupational Outlook Handbook* (*Handbook*), 2002-03 edition at 268, the Department of Labor describes, in part, the duties of a registered nurse:

> Registered nurses (RNs) work to promote health, prevent disease, and help patients cope with illness. They are advocates and health educators for patients, families, and communities. When providing direct patient care, they observe, assess, and record symptoms, reactions and progress; assist physicians during treatments and examinations; administer medications; and assist in convalescence and rehabilitation. RNs also develop and manage nursing care plans; instruct patients and their families in proper care; and help individuals and groups take steps to improve or maintain their health. While State laws govern the tasks that RNs may perform, it is usually the work setting that determines their

daily job duties.

> *Hospital nurses* form the largest group of nurses. Most are staff nurses, who provide bedside nursing care and carry out medical regiments. They also may supervise licensed practical nurses and nursing aides. Hospital nurses usually are assigned to one area, such as surgery, maternity, pediatrics, emergency room, intensive care, or treatment of cancer patients. Some may rotate among departments.
>
> . . . .
>
> *Nursing home nurses* manage nursing care for residents with conditions ranging from a fracture to Alzheimer's disease. Although they often spend much of their time on administrative and supervisory tasks, RNs also assess residents' health condition, develop treatment plans, supervise licensed practical nurses and nursing aides, and perform difficult procedures such as starting intravenous fluids. They also work in specialty-care departments, such as long-term rehabilitation units for patients with strokes and head-injuries.

A review of the *Handbook* finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a registered nurse.

> 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. A.D.N. programs, offered by community and junior colleges, take about 2 to 3 years. About half of the 1,700 RN programs in 2000 were at the A.D.N. level. B.S.N. programs, offered by colleges and universities, take 4 or 5 years. More than one-third of all programs in 2000 offered degrees at the bachelor's level. Diploma programs, administered in hospitals, last 2 to 3 years. Only a small number of programs offer diploma-level degrees. Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses. *Id at 269.*

On November 27, 2002, CIS issued a policy memorandum on H-1B nurse petitions (nurse memo) and 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] As stated in the nurse memo, certification examinations are available to registered nurses who work in such specialties and possess additional clinical experience, but who are not advanced practice nurses. The mere fact, however, that a nursing position has a title such as "specialty registered nurse," or "sub-acute care" in this instance, does not necessarily mean that the position qualifies as a specialty occupation.

The AAO looks beyond the title of the position and determines, from a review of the position's duties 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 of higher degree (or its equivalent), CIS maintains

---

[1] Memorandum from 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).

discretion to use as advisory opinions statements submitted as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The AAO must be satisfied that the ultimate employment of the alien is in a specialty occupation, regardless of the position's title. Here, the duties of the position do not entail any specialized or complex responsibilities that involve the theoretical and practical application of a body of highly specialized knowledge. The duties ascribed to the offered position are routine to many registered nurse positions. The fact that the beneficiary would perform these duties within a sub-acute care unit with medically complex cases, does not elevate the duties complexity. CIS cannot find, based upon the current record, that the job fits the criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has also failed to establish that the proffered position meets any of the remaining three criteria for qualification of the position as a specialty occupation. Any of the three career paths noted above are sufficient for the beneficiary to perform the duties associated with the offered position. There is no requirement that a nurse have a baccalaureate or higher degree, or its equivalent, for entry into the position. Thus, the petitioner has not established compliance with 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not shown that a degree requirement is common to the industry in parallel positions among similar organizations, or that the position is so complex or unique that it can be performed only by an individual with a degree. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). In support of that assertion the petitioner submitted statements from [redacted] Senior Vice President of New York Methodist Hospital, and Maly Rottenberg, an insurance account executive. Mr. [redacted] states that his organization intends to refer upwards of 500 patients to the petitioner for short and long term care. He further indicates that his organization has determined that the minimum educational requirement for nurses caring for those patients is a bachelor of nursing degree. New York Methodist Hospital may certainly place any minimum educational requirement that it deems appropriate on facilities to which it refers it patients. The decision of the hospital does not, however, establish an industry standard in that regard. The opinion, therefore, is weighted accordingly. Likewise, the statement of Mr. [redacted] does not establish an industry standard for educational requirements of nurses performing duties similar to those of the offered position. Industry educational requirements for registered nursing positions are not determined by the requirements of insurance companies in deciding whether to underwrite particular insurance policies. The minimum educational requirements for registered nurses are determined by industry practice as a whole. The duties to be performed by the beneficiary are routine in the industry, and not so complex or unique that they can only be performed by an individual with a bachelor's degree in nursing.

The petitioner indicated that it employs only nurses with bachelor's degrees for sub-acute care patients. The petitioner's self imposed hiring standards, however, are not crucial to the determination of whether the proffered position qualifies as a specialty occupation. The determining factor is whether the position involves the theoretical and practical application of a body of highly specialized knowledge requiring a bachelor's degree for entry into the occupation. *Cf. Defensor v. Meissner*, 201 F.3d 388 (5th Cir. 2000). The duties of the offered position do not require such highly specialized knowledge. Compliance with 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) has, therefore, not been established.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. It is, therefore, concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

It should further be noted that the petitioner's reference to CIS approvals of unrelated H-1B nursing petitions does not sustain the petitioner's burden of establishing H-1B qualification in the petition now before the AAO. This record of proceeding does not contain the entire records of proceeding in the petitions referred to by counsel. In the absence of all of the corroborating evidence contained in those records of proceeding, the AAO is unable to determine whether the referenced approvals were approved in error.

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, the AAO 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 approvals were granted 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 the record of proceeding now before the AAO, however, the approval of the prior petitions would have been erroneous. The AAO 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 of 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).

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 and the appeal shall accordingly be dismissed.

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