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U.S. Citizenship
and Immigration
Services

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FEB 26 2004



FILE: EAC 01 202 57881 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 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 skilled nursing facility that seeks to employ the beneficiary as a charge 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.

Section 214(i)(1) of the Immigration and Nationality Act (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 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 charge registered nurse. According to the evidence in the record, the beneficiary would perform duties that entail, in part: serving as charge registered nurse using the Humanistic Management Model of Nursing; coordinating and supervising nursing activities; rendering nursing expertise and knowledge; assuming total responsibility for nursing care of the shift within an assigned unit; developing and monitoring developmental milieu; using a variety of nursing technologies; utilizing the self-care deficit model of nursing in assessing, designing, implementing, evaluating, and controlling nursing systems; providing leadership; implementing effective recording and reporting mechanisms; assuming an active role in research, education, and facility activities; and conducting unit in-services program. The petitioner indicated that the proffered position requires a bachelor's degree 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). The director cited the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, which states that an individual does not need to hold a baccalaureate degree in nursing to fill a registered nurse position.

On appeal, the petitioner submits a letter from the president of a job placement agency who states, in part, that identical petitions for the petitioner have been approved previously, and that the petitioner normally requires a minimum of a baccalaureate degree in nursing for a charge nurse positions. In support of its claim that the proffered position is a specialty occupation, the petitioner submits additional evidence from the following: The American Association of Colleges of Nursing (AACN); the Pew Health Professions Commission; the National Advisory Council on Nurse Education and Practice; The Department of Veterans Affairs (DVA); [REDACTED] President and CEO of the Citizen Advocacy Center (CAC); and the Department of Nursing, Humboldt State University.

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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. In its *Handbook*, 2002-2003 edition, at page 269, the DOL 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.

....

[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, although reference is made to two nursing positions within the classification of registered nurse that appear analogous to the proffered position. 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.

The proffered position appears to resemble a nursing position beyond the entry-level registered nurse, but it does not appear to be analogous to an administrative nursing position. A recent 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.)" The *Handbook* reference is to the classification of medical and health services managers. On page 75, 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.

The structure and financing of healthcare is changing rapidly. Future medical and health services managers must be prepared to deal with evolving integrated healthcare delivery systems, technological innovations, an increasingly complex regulatory environment, restructuring of work, and an increased focus on preventive care. . . . Increasingly, medical and health services managers will work in organizations in which they must optimize efficiency of a variety of interrelated services, for example, those ranging from inpatient care to outpatient follow-up care.

....

In smaller facilities, top administrators handle more of the details of daily operations. For example, many nursing home administrators manage personnel, finance, facility operations, and admissions, and have a larger role in resident care.

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. It is noted that the beneficiary holds a baccalaureate degree in nursing. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required as a minimum for entry into the position being offered to the beneficiary.

The record does not include any evidence regarding parallel positions in the petitioner's industry or from professional associations regarding an industry standard. In addition, no documentation to support the complexity or uniqueness of the proffered position was submitted. The record contains a position statement by the American Association of Colleges of Nursing (AACN), recognizing the Bachelor of Science degree in nursing as the minimum educational requirement for professional nursing practice. The AACN notes that presently only about 40 percent of the basic registered workforce hold baccalaureate or higher degrees in nursing. As such, despite its position statement recognizing the Bachelor of Science degree in nursing as the minimal educational requirement for professional nursing practice, less than half of currently employed registered nurses hold bachelor's degrees as their highest academic credential. Furthermore, although the "Pew Health Professions Commission called for the closing of up to 20 percent of associate-degree and hospital diploma nursing programs in favor of more concentrated production of bachelor's- and higher-degree nursing graduates," this does not constitute an industry wide standard requiring such higher degrees. Nor does the "urging" by the National Advisory Council of Nurse Education and Practice that "at least two-thirds of the basic registered nurse force hold baccalaureate degrees in nursing by 2010" or the consumer perspective by [REDACTED] who states, in part, that more interdisciplinary education is needed in all health professions, constitute an industry wide standard requiring such higher degrees.

Furthermore, the news release from the DVA of its recently endorsed a policy whereby all registered nurses employed in its medical facilities and hospitals would be required to hold a baccalaureate degree in nursing, is also noted. Although the DVA is the largest employer of registered nurses, it is just one example of an organization that employs registered nurses. The petitioner has not presented any other evidence, such as letters or affidavits from hospitals or other employers of registered nurses, that such organizations "routinely employ and recruit only degreed individuals" for the position of a registered nurse. *See Shanti, Inc. v. Reno, supra* at 1165. One employer's hiring practices does not exemplify the industry standard.

The DVA is merely one government agency among many, and its policies are not binding on CIS. As previously stated, the DVA's stipulated educational requirements for its registered nurses do not represent the nursing industry or all employers of registered nurses. Therefore, CIS is not bound to find that the position of a registered nurse is a specialty occupation simply because the DVA has determined that it, alone, shall require its registered nurses to hold a baccalaureate degree.

The AAO further contends that the DVA may not be considered a "similar organization," as it employs approximately 36,000 registered nurses, whereas the petitioner employs far less than this number of registered nurses. Instead of relying solely on the DVA's educational requirements, the petitioner should have presented information regarding the educational requirements for registered nurses in facilities that are similar to the size and scope of its operations, in order to establish that a degree in a specific field of study is common to the industry in parallel positions within similar organizations.

Furthermore, with respect to the petitioner's objection to denial of this petition in view of the approval of similar petitions in the past, the AAO is never bound by a decision of a service center or district director. *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).The petitioner has, thus, 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, the petitioner states that it normally requires the minimum of a baccalaureate degree in nursing for its charge registered nurse positions. According to the I-129 petition, the petitioner was established in 1983 and it currently has 350 employees. To demonstrate that it normally requires a BSN for employment in the proffered position, the petitioner would need to document the credentials of all of its charge registered nurses. Without documentary evidence, the petitioner will not meet its burden or proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation, regardless of the petitioner's past hiring practices. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th 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.¹ In this regard, the petitioner fails to establish that the registered nurse position it is offering to the beneficiary entails the theoretical and practical application of a body of highly specialized knowledge.

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

The petitioner submits a description of the curriculum for a baccalaureate program in nursing from the Department of Nursing at Humboldt State University. The AAO cannot assume, however, that the additional training that the baccalaureate program provides is solely related to the alleged complexity of the proffered position. Simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in this proceeding. *See Matter of Treasure Craft of California, id.* To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, 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. Accordingly, the AAO shall not disturb the director's denial of the petition.

¹ 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.