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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
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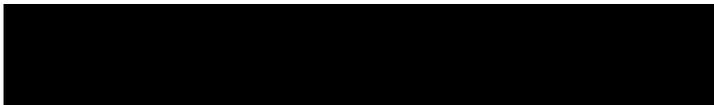
**U.S. Citizenship
and Immigration
Services**



FILE: EAC 01 272 53609 Office: VERMONT SERVICE CENTER

Date: **MAR 22 2004**

IN RE: Petitioner:
Beneficiary:



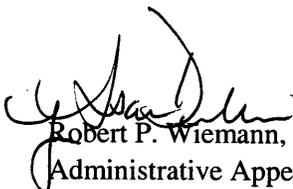
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)

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 nursing home that seeks to extend its authorization to employ the beneficiary as a supervisory nurse practitioner. 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 and the beneficiary is not qualified to perform a specialty occupation. On appeal, the petitioner states, in part, that the beneficiary's position and job duties have not changed and, therefore, the request for an extension should be approved. The petitioner also states that current rules allow for an extension up to seven years of the H-1B classification. The petitioner had indicated that a brief and/or additional evidence would be submitted to the AAO within 30 days. As of this date, however, the AAO has not received any additional evidence into the record. Therefore, the record is complete.

The AAO will first address the director's conclusion that the position is not a specialty occupation.

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 supervisory nurse practitioner. Evidence of the beneficiary's duties includes the I-129 petition and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform patient care duties associated with kidney and urinary system diseases. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in nursing.

The director found that the proffered position was not a specialty occupation because the proposed duties are not so complex as to require a baccalaureate degree in nursing. Citing to the Department of Labor's (DOL) *Occupational Outlook 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 found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner states only that the beneficiary's position and job duties have not changed and, therefore, the request for an extension should be approved. Thus, the AAO will focus its discussion on this issue only.

The AAO does not agree with the petitioner's assertion that the proffered position would normally require a bachelor's degree in nursing or a related field. The proffered position is that of a registered nurse who will perform patient care duties associated with nephrology (kidney and urinary system diseases). A review of the DOL's *Handbook*, 2002-2003 edition, at page 269, finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a registered nurse. The three educational paths to nursing are as follows: Associate degree in nursing (A.D.N.), Bachelor of Science degree in nursing (B.S.N.), and diploma. The *Handbook* further states:

[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.

As the record does not demonstrate that the beneficiary's proffered position is primarily an administrative position, or a graduate nursing program in research, consulting, teaching, or a clinical specialization, 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.

It is noted that on November 27, 2002, the Immigration and Naturalization Service, now 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 However, the mere fact that a nursing position has a title such as “critical care” does not necessarily mean that it qualifies as a specialty occupation.²

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

Although the proffered position is that of a registered nurse assigned to duties associated with nephrology, 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 position are routine to many registered nurse positions. Just because the duties relate to nephrology does not elevate the duties’ complexity.

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).

Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

The petitioner’s statement that the beneficiary has an application for permanent residence pending and current rules allow for an extension of H-1B status of up to seven years is noted. However, as the AAO is dismissing the appeal because the job is not a specialty occupation, it will not discuss these issues.

The director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. Again, as the AAO is dismissing the appeal because the job is not a specialty occupation, it will not discuss the beneficiary’s qualifications.

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).

² It is worth noting that the nurse memo also mentions that certification examinations are available to such registered nurses who may work in such nursing specialties and possess additional clinical experience, but who are not advanced practice nurses.

EAC 01 272 53609

Page 5

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.