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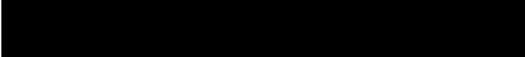
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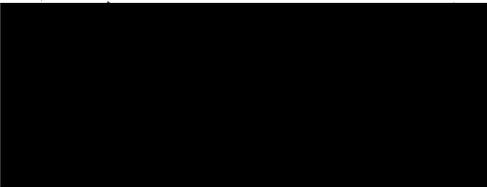
DA

FILE: EAC 02 196 53194 Office: VERMONT SERVICE CENTER Date: **MAR 17 2005**

IN RE: Petitioner: 
Beneficiary: 

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.

for Michael T. Kelly
Robert P. Wiemann, Director
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 a sub-acute care facility that seeks to employ the beneficiary as a 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 and the beneficiary is not qualified to perform a specialty occupation. On appeal, counsel submits a brief and additional and previously submitted evidence.

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 registered nurse (RN). Evidence of the beneficiary's duties includes: the Form I-129; the letter accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would plan, direct, and supervise nursing care provided by 50 subordinates; supervise the administration of tests, treatments, and procedures; participate in ongoing nursing research; and evaluate, assess, and plan the nursing care of patients. The beneficiary will be responsible for at least one registered nurse, two licensed practice nurses (LPN), certified nursing assistants (CNA), and nurses' aides. The petitioner stated that a candidate must possess a bachelor's of science degree in nursing (BSN) or its equivalent.

The director found that the proffered position is not a specialty occupation. The director stated that the evidence did not support the contention that the nursing industry distinguishes entry-level from professional registered nurses; that the proffered position is specialized, complex, or unique, requiring a candidate with a specific baccalaureate degree; or that the attainment of a baccalaureate or higher degree is usually associated with the position's duties. According to the director, the Department of Labor's (DOL's) *Occupational Outlook Handbook* (the *Handbook*) shows that an advanced practice nurse must meet educational and clinical practice requirements beyond an RN's educational and licensing requirements. The director stated that the *Handbook* relays that a baccalaureate or higher degree or its equivalent is not normally the minimum requirement for entry into the proffered position. The director stated that no evidence demonstrated that the proffered position resembles a nurse administrator or an advanced practice nurse or that it requires admission to a graduate nursing program. The director found the evidence from the Health Professions Bureau consistent with the *Handbook's* information. The director gave little weight to the statement made by the American Association of Colleges of Nursing (AACN), the Department of Veterans Affairs (VA) hiring policy, and the opinion letter. The director found the petitioner failed to explain and document how the BSN differs from the associate and diploma degree programs, and failed to submit evidence showing why a fully licensed nurse who graduated from an associate or diploma program is incapable of performing as a head nurse. The director found that the petitioner had not shown that it normally requires a baccalaureate degree for the proffered position. According to the director, no evidence established that the proffered position is an administrative or an upper-level managerial position as described in the document entitled "Guidance on Adjudication of H-1B petitions Filed on Behalf of Nurses." The director stated that the petitioner failed to submit the requested organizational chart.

On appeal, counsel states that the proffered position, head nurse, qualifies as a specialty occupation, and refers to the description of the proffered position, a November 27, 2002 memorandum (the nurse memo), an opinion letter from a medical expert, a *Journal of the American Medical Association (JAMA)* study, information about degree programs in nursing, a press release, evidence from the VA, and prior approval notices to support his statement.

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.

On appeal, counsel asserts that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. To support this assertion, the record contains approval notices. This record of proceeding does not, however, contain all of the supporting evidence submitted to the Vermont Service Center in the prior cases. In the absence of all of the corroborating evidence contained in the record of their proceedings, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the petitions were parallel to the offered position. Furthermore, 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). If the other nonimmigrant petitions were approved based on identical facts that are contained in the current record, those approvals would be in violation of paragraph (h) of 8 C.F.R. § 214.2, and would constitute material and gross error on the part of the director. The AAO is not required to approve applications or 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). It would be absurd to suggest that CIS or any 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).

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position; a specific 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 in a specific specialty.

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. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Counsel claims that the nurse memo indicates that in certain circumstances administrative nurses can qualify for H-1B classification. Referring to the nurse memo, counsel states that it discloses that an upper-level nurse manager in hospital administration qualifies for H-1B classification when the position is an upper-level supervisory and managerial nurse that requires an RN license and a BSN. Thus, counsel states that since the beneficiary will occupy an upper-level managerial and supervisory nurse position, and the petitioner requires a BSN or the equivalent and an RN license, the proffered position is a specialty occupation. Referring to Exhibit F, submitted on appeal, to describe the beneficiary's duties, counsel contends the duties reflect skills used by skilled nursing and department/unit managers. Counsel states that upper-level nurse administrators and supervisors are involved in facility administration and operations, education, correcting and disciplining subordinates, and developing policies. Counsel maintains that the proffered position is not an entry-level position, and that the three paths described in the *Handbook* refer to entry-level positions. Counsel states that

an RN with a limited permit can direct the activities of fully licensed RNs, and that CIS has approved such petitions in the past.

In determining whether a position qualifies as a specialty occupation, CIS 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.

There are material inconsistencies in the record regarding the requirements of the proffered position. The document entitled "Exhibit F" submitted on appeal indicates that a candidate must possess an RN license and the following qualification for the proffered position:

Nursing degree from an accredited college or university. Graduation from an approved school of nursing and experience may be considered in lieu of degree.

This evidence indicates that the petitioner does not require candidates to possess a BSN; the petitioner is willing to substitute experience and graduation from an approved school of nursing in place of the BSN. As such, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position.

Counsel contends that the nurse memo "recognizes and accepts experience as the equivalent of finishing the baccalaureate degree," and states that the regulation at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(5) also provides for degree equivalency. Counsel's statements are not persuasive. Educational equivalency is considered by CIS only when a specific degree does not exist in an occupational field. *Tapis Int'l v. INS*, 94 F.Supp. 2d 172 (D. Mass. 2000). Here, baccalaureate and master's degrees in nursing and health administration are available; thus, the AAO will not consider educational equivalency. Furthermore, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) deals with determining whether the beneficiary is qualified to perform a specialty occupation; it does not involve determining whether a particular position qualifies as a specialty occupation.

The evidence in the record fails to establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations or the particular position is so complex or unique that it can be performed only by a person with a degree. As already discussed, because Exhibit F indicates that the petitioner is willing to substitute experience and graduation from an approved school of nursing in place of the BSN, the petitioner cannot establish 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Since Exhibit F shows that the petitioner is willing to substitute experience and graduation from an approved school of nursing in place of the BSN, the petitioner cannot establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that it normally requires a degree or its equivalent for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually

associated with the attainment of a baccalaureate or higher degree. Because Exhibit F reveals that the petitioner is willing to substitute experience and graduation from an approved school of nursing in place of the BSN, the petitioner cannot establish 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Although counsel claims that CIS is requiring that the petitioner establish all four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), this is not so. The director's denial letter considered the evidence in the record and the duties of the proffered position to determine whether the petitioner satisfied any one of the four criteria. No language in the denial letter indicated that the director required the petitioner to establish all four criteria.

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.

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