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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: EAC-01-207-54714

Office: Vermont Service Center

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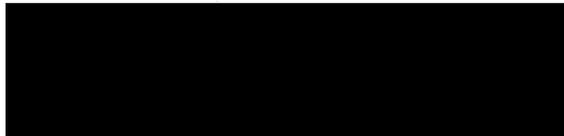
IN RE: Petitioner:  
Beneficiary:



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)

IN BEHALF OF PETITIONER:

**PUBLIC COPY**



**INSTRUCTIONS:**

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the director, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a long-term nursing care facility with 150 employees and a stated gross annual income in excess of \$4.23 million. It seeks to extend the employment of the beneficiary as a registered nurse for a period of three years. The director determined that the petitioner had not established that the proffered position is a specialty occupation or that the beneficiary is qualified to perform services in a specialty occupation.

On appeal, counsel submits a brief and additional documentation.

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 nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i) (1) of the Act, 8 U.S.C. 1184(i) (1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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 section 214(i) (2) of the Act, 8 U.S.C. 1184(i) (2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

8 C.F.R. 214.2(h) (4) (ii) defines the term "specialty occupation" 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.

The director concluded that the petitioner had failed to establish that a baccalaureate degree in a specific specialty is a standard minimum requirement for the job offered. The director also determined that the beneficiary was not qualified to perform services in a specialty occupation because her foreign education did not equate to a United States baccalaureate degree. On appeal, counsel argues that the proffered position is in fact that of assistant nurse manager, rather than that of registered nurse. Counsel asserts that the offered job is a specialty occupation because it requires at least a bachelor of science degree in nursing or its equivalent. Counsel contends that the beneficiary possesses the equivalent of a bachelor of science degree in nursing by virtue of her education and work experience. Counsel further argues that the Service had already determined that the offered position is a specialty occupation and that the beneficiary was qualified to perform services in this position by approving a prior petition for the same position submitted by the petitioner on her behalf.

The Service does not agree with counsel's argument that the proffered position requires a bachelor of science degree in nursing. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the proffered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In a letter which accompanied the initial I-129 petition, the petitioner described the duties of the offered position as follows:

[The beneficiary] will utilize the nursing process in assessing, planning, implementing and evaluating quality [of] resident care. She will coordinate nursing care in collaboration with physicians and ancillary health care providers. She will demonstrate comprehensive understanding of the pathophysiology associated with disease processes common to the resident population in a long-term setting. She will demonstrate skill and knowledge of scientific principles in carrying out nursing care procedures/techniques in a safe and efficient manner. She will develop relationships with residents and exhibit concern and support for their well-being. She assume responsibility for the comfort and safety of all residents and be knowledgeable about protocols related to disaster, fire, and emergency resident care. She will complete flow sheets or other resident care forms. She will report appropriate information related to resident care to physician, delegated charge nurse, Supervisor/Nurse Manager and/or Director of Nursing. She will utilize interdepartmental resources to assist in providing comprehensive resident care. She will provide resident teaching, individualized,

inclusive and appropriate for the level of resident/family comprehension.

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.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

The Service does not agree with counsel's argument that the proffered position of a registered nurse would normally require a bachelor's degree in nursing or a related field. The Department of Labor's Occupational Outlook Handbook (Handbook), 2002-2003 Edition, at pages at pages 268-270, 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 that:

There have been attempts to raise the educational requirements for an R.N. license to a bachelor's degree and, possibly, create new job titles. These changes, should they occur, will probably be made State by State, through legislation or regulation.... In fact, many career paths are open only to nurses with bachelor's or advanced degrees. A bachelor's degree is usually necessary for administrative positions and is a prerequisite for admission to graduate nursing programs in research, consulting, teaching, or a clinical specialization.

Counsel argues that the offered job is an administrative position which the Handbook recognizes as an exception to the general classification of registered nurse positions. However, the description of the proffered position's duties demonstrates that such position is not exclusively administrative in nature as it includes elements involving direct patient care, supervision of the nursing and other staff, management of daily activities, maintenance of medical records, and interaction with patients and their families.

A review of the Handbook finds no support for the argument that the offered position is a specialty occupation based on the beneficiary's supervision of other nurses and performance of associated duties considered to be administrative in nature. The Handbook at page 268 specifically notes that a nurse supervisor's duties include both administrative and management functions such as planning work schedules, assignment of duties, provision of training programs, records maintenance, and ordering of supplies and equipment. As the record does not demonstrate that the beneficiary's proffered position is an administrative position, or a graduate nursing program in research, consulting, teaching, or a clinical specialization, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

The petitioner has failed to establish that it has, in the past, required the services of individuals with baccalaureate or higher degrees for the offered position. The petitioner has not submitted any evidence to demonstrate that the degree requirement is common to the industry in parallel positions among similar organizations. Finally, the petitioner has failed to establish that 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 has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or

higher degree required by the specialty occupation from an accredited college or university;

3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The beneficiary was awarded a diploma by the Affiliated Nursing School of 334 Hospital in Nanchung, China after completion of a three year program of study in nursing in August 1983. The beneficiary was subsequently issued a certificate for passing both the nursing and English language proficiency sections of the qualifying examinations conducted by the Commission on Graduate Foreign Nursing Schools in Philadelphia, Pennsylvania in September 1995. The beneficiary is also licensed as a registered nurse by the Commonwealth of Massachusetts. Accordingly, it is concluded that the petitioner has shown that the beneficiary qualifies to perform the duties of the proffered position, and therefore, has overcome this particular portion of the director's denial.

The statements put forth by counsel on appeal regarding the fact that the beneficiary was no longer employed in the originally proffered position of registered nurse, but rather was currently employed in the position of assistant nurse manager are acknowledged. Upon initial submission, both the I-129 petition and corresponding labor condition application specified that the petitioner would employ the beneficiary as a registered nurse. The record contains evidence that the beneficiary is now employed by the petitioner in a differing role as a assistant nurse manager. This represents a substantial change in the proffered position as listed on the I-129 petition at the time of the initial filing. In such a case, the regulations require the petitioner to file an amended or new petition, with fee, to the office where the original petition was filed to reflect these changes. In the case of an H-1B petition, this requirement includes obtaining a new labor condition application from the Department of Labor. 8 C.F.R. 214.2(h)(2)(i)(E). As of the date of this decision, the petitioner has failed to file either an amended or new petition containing an

accurate listing of the proffered position or a new labor application listing the job offered as assistant nurse manager. In addition, it must be noted that the petitioner has effectively eliminated any further consideration of the original petition by acknowledging that the proffered position listed in such petition was no longer being offered to the beneficiary.

With respect to counsel's objection to denial of this petition in view of the previous approval of a petition filed by the petitioner on behalf of the beneficiary, this Service is not required to approve applications or petitions where eligibility has not been demonstrated. The record of proceeding, as presently constituted, does not contain a copy of the approved visa petition and its supporting documents. It is, therefore, not possible to determine definitively whether it was approved in error or whether the facts and conditions have changed since its approval. Determinations of eligibility are based on the totality of evidence available to this Service at this time. The Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v INS, 2000 WL 282785 (E.D.La. 2000), aff'd, 248 F. 3d 1139 (5th Cir. 2001), cert. denied, 122 S. Ct. 51 (U.S. 2001).

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.