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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 01 087 53722 Office: VERMONT SERVICE CENTER Date:

JAN 29 2002

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:



identification data deleted to
event clearly unwarranted
invasion of personal privacy.

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 which 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 Director of the Vermont Service Center denied the nonimmigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a nursing home with approximately 160 employees and a gross annual income in excess of \$8,000,000. It seeks to employ the beneficiary as a registered nurse for a period of three years. The director denied the petition finding that the beneficiary did not possess the proper licensure to practice the occupation.

On appeal, counsel submits a brief. Counsel states, in part, that the beneficiary possesses the proper credentials for a temporary license to practice the 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.

8 C.F.R. 214.2(h)(4)(v) states that:

- (A) *General.* If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.
- (B) *Temporary licensure.* If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

In support of its claim that the beneficiary possessed the proper licensure to practice as a registered nurse in the State of New York, the petitioner submitted a copy of the beneficiary's Commission on Graduates of Foreign Nursing Schools (CGFNS) certificate. The director found that the beneficiary's CGFNS certificate was not evidence that the beneficiary would be allowed to perform the duties of a registered nurse and, therefore, the director denied the petition.

On appeal, counsel states that the beneficiary does not yet possess a full and unrestricted license to practice as a registered nurse in the State of New York; however, counsel contends that the beneficiary is, nevertheless, eligible for temporary licensure.

According to counsel, the beneficiary is eligible for a temporary license because the beneficiary possesses a foreign nursing degree, a registered nurse's license from the country that issued the foreign degree, and a CGFNS certificate. Counsel states that "[i]nasmuch as everything has already been done by CGFNS, for the State of New York, the issuance of the limited permit is a mere administrative function at this point, for which the beneficiary fully qualifies."

Counsel states that the beneficiary has not yet applied for temporary licensure, which in the State of New York is referred to as a "limited permit," because the issuance of the limited permit is only valid for one year and the beneficiary needs the entire one-year period of time while in the United States to pass the full licensure for the State of New York, which is called the NCLEX. Counsel informs the Service that the beneficiary would not apply for the limited permit until the beneficiary is scheduled for an interview with a consular officer.

As previously stated, the Service may approve H classification for an alien if a temporary license is available and the alien, under supervision, is authorized to fully perform the duties of the occupation. Based upon evidence that counsel presents on appeal, the beneficiary does not possess a full license to practice as a registered nurse in the State of New York and is not qualified for a limited permit (temporary licensure). Therefore, the petition may not be approved.

On appeal, counsel submits information from the New York State Department of Education (NYSED), Office of the Professions, regarding the requirements for licensure in that state as a registered nurse. Information from NYSED states the following about receiving a limited permit (temporary license) for an individual whose education was obtained outside of the United States:

Limited Permits

Foreign-educated applicants seeking a limited permit as a registered professional nurse must also **have their credentials verified by an independent credentials verification organization** and document successful completion of the Commission on Graduates of Foreign Nursing Schools (CGFNS) Certification program (the

CGFNS examination and the Test of English as a Foreign Language); or a score of not less than 400 on the Canadian Nurses Association Test (CNATS). This does not apply to LPN limited permit applicants.

(Emphasis added.) The record contains a copy of the beneficiary's CGFNS certificate, which indicates that the beneficiary successfully completed both the CGFNS qualifying examination and the Test of English as Foreign Language (TOEFL). However, the record does not contain evidence that the beneficiary's credentials have been verified by an independent credentials verification organization, as required by NYSED. According to the NYSED, the verification of an individual's credentials is different from CGFNS certification:

If you seek to meet the education requirements for Registered Nurse or Licensed Practical Nurse through a program you completed outside the United States, your educational credentials must be verified by an independent credentials verification organization.

. . . **Please Note:** This verification process is not the same as CGFNS certification (which is required for Registered Nurse limited permit applicants only). The CGFNS credentials verification process for New York State licensure applicants is a process for verifying the authenticity of your education credentials. It is not an evaluation or certification process.

(Emphasis in the original.) Based upon this information, even if the Service were to conclude that the beneficiary could practice as a registered nurse with a temporary license, the beneficiary's lack of a credentials evaluation makes the beneficiary ineligible to receive a limited permit in the State of New York. Accordingly, the director's decision will not be disturbed.

Beyond the decision of the director, the proffered position of a registered nurse does not meet the qualifications for classification as a specialty occupation pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A).

First, the petitioner has not established that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. 8 C.F.R. 214.2(h)(4)(iii)(A)(1).

The Service often looks to the U.S. Department of Labor's (DOL), Occupational Outlook Handbook (Handbook) when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. In the 2000-2001 edition of the Handbook at pages 211-212, 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.

. . . some 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 petitioner is offering to the beneficiary the position of a registered nurse. The offered position is not an administrative position which, depending upon the duties of the position, may require the attainment of a bachelor's or higher degree for the position. The DOL, which is an authoritative source for educational requirements for certain occupations, does not indicate that a bachelor's degree in a specialized area is the minimum requirement for any registered nurse position, including the type being offered to the beneficiary.

Second, the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, that its particular 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).

Factors often considered by the Service when determining the industry standard include: whether the DOL's 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." 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 DOL's conclusions about a degree requirement for a registered nurse position were discussed in the previous section, and shall not be repeated here. Regarding information from professional nursing associations, neither counsel nor the petitioner presents evidence that any nursing association has made a baccalaureate or higher degree a minimum entry requirement.

Counsel's main argument against the denial of the petition

concerns the Department of Veterans Affairs' (DVA) hiring practices for its registered nurse positions. Counsel states the following about the impact of this hiring practice on whether a registered nurse position can be considered a specialty occupation:

A significant change in the position of the Government of the United States in how it views the position of "Registered Nurse" has now been recorded. **The Veteran's Administration, part of the Department of Veterans Affairs, has concluded that the position to be filled by a registered nurse is a specialty occupation that can only be filled by a registered nurse with a baccalaureate degree.**

. . . It is the citation of authority recognized by [the] Immigration & Naturalization Service that this position is true. The failure of the Immigration & Naturalization Service to follow the lead of another area of the Government, where the hospital-petitioner wishes to do so, should be viewed as grounds to reverse the decision of the Center Director.

(Emphasis in the original.) Counsel contends that the DVA's enactment of a policy that mandates its registered nurses to have baccalaureate degrees indicates that a degree requirement is common to the industry in parallel positions. The Service, however, does not find counsel's statement persuasive.

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 Service strongly disagrees with counsel that the policy enacted by the DVA is the "position of the government." The DVA is merely one government agency among many, and its policies are not binding on the Service. 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, the Service 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 Service 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.

Additionally, counsel has not presented any evidence that the offered position is so complex or unique that it can be performed only by an individual with at least a baccalaureate degree.

It is noted that while counsel has consistently stated that the proffered position requires an individual to deal with critically ill patients, the petitioner has never presented a comprehensive job description for the beneficiary. Counsel's statements, by themselves, are insufficient proof that the position at the petitioning organization is either complex or unique. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Third, the petitioner has not established that the employer normally requires a degree or its equivalent for the position. 8 C.F.R. 214.2(h)(4)(iii)(A)(3).

The petitioner has not presented evidence that it normally requires a degree or its equivalent for the proffered position of a registered nurse. The petitioner has submitted five letters from medical doctors within its facility, four of which are identically worded and state that:

This is to attest that medically an entry-level RN is, without many years of training, unable to take a position in the unit without close supervision and constant monitoring. The reasoning is that that safety of the resident requires highly trained educated nurses.

The attention of the Service is drawn to the remarkable similarity of the submitted letters. All letters share the same paragraph that has been copied verbatim; they appear to have been drafted by the same individual. Therefore, the Service must question whether they represent the true testimony of the avowed authors. The Service may, in its discretion, accept letters and advisory opinion statements as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. Matter of Caron International, 19 I&N Dec. 791 (Comm., 1988).

While it is understandable that the petitioner would prefer to hire individuals with at least a bachelor's degree, the petitioner has not shown that a degree has been, and continues to be, a requirement in its hiring practices.

Fourth and finally, the petitioner has not established that the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. 8 C.F.R. 214.2(h)(4)(iii)(A)(4).

Counsel contends that the proffered position is a "professional level" nursing position and, therefore, encompasses specialized and complex duties that can only be performed by an individual who has attained a baccalaureate or higher degree. Counsel maintains that the main difference between a professional nurse and an entry-level nurse is the requirement that the professional nurse is expected to, and must actually perform, functions beyond the skill and knowledge of the entry-level nurse.

The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Although counsel contends that the position of a registered nurse requires the attainment of a baccalaureate or higher degree due to the complex and sophisticated nature of the position's specific duties, counsel does not present any evidence in support of his assertions. Furthermore, although counsel refers to a registered nurse position as a "professional level" position, counsel does not demonstrate that the nursing industry is comprised of "professional level" and "entry-level" positions.

Accordingly, even if the petitioner had established that the beneficiary was qualified to receive a temporary license to practice as a registered nurse, the petition could not be approved because the proffered position is not a specialty occupation.

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.