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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

[Redacted]

File: EAC-01-105-50252 Office: Vermont Service Center

Date: OCT 10 2002

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

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:

[Redacted]

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

[Signature]
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. A subsequent motion to reopen was dismissed by the director. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a health care center with 645 employees and a gross annual income of \$35 million. It seeks to employ the beneficiary as a registered nurse for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a brief and requests oral argument.

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.

Section 214(i)(1) of 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.

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 denied the petition because the petitioner had not submitted sufficient evidence to establish that the position of registered nurse requires a Bachelor of Science degree in Nursing (BSN).

On appeal, counsel argues that the duties of the proffered position are so specialized and complex that the attainment of a BSN is required for entry into the occupation.

Counsel's argument on appeal is noted. 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 offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

Will perform nursing services either as Charge Nurse/Supervising Nurse and/or Specialized duties including but not limited to pulmonary rehab. Infusion therapy, orthopedic rehabilitation. Pain management, wound management, surgical recovery and oncology care and other specialized duties.

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 registered nurse working in a nursing home environment requires a BSN. In its Occupational Outlook Handbook (Handbook), 2002-2003 edition, at page 268, the Department of Labor (DOL) describes the job of a registered nurse working in a nursing home as follows:

Nursing home nurses manage nursing care for residents with conditions ranging from a fracture to Alzheimer's disease. Although they often spend much of their time on administrative and supervisory tasks, RNs also assess residents' health condition, develop treatment plans, supervise licensed practical nurses and nursing aides, and perform difficult procedures such as starting intravenous fluids. They also work in specialty-care departments, such as long-term rehabilitation units for patients with strokes and head-injuries.

A review of the Handbook at pages 268-270 finds no requirement of a BSN degree 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 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. A.D.N. programs, offered by community and junior colleges, take about 2 to 3 years. About half of the 1,700 RN programs in 2000 were at the A.D.N.

. . . 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.

Counsel asserts that the proffered position is a specialty occupation in that the beneficiary would supervise licensed practical nurses and nursing aides. However, the duties of the position are not exclusively administrative in nature as the job includes elements involving direct patient care. According to the Handbook, the supervision of licensed practical nurses and nurses' aides is one of the duties normally expected of registered nurses working in a nursing home setting.

Counsel further asserts that the proffered position is a specialty occupation because the beneficiary would be responsible for patients in sub-acute care and patients who have serious medical illness. Counsel contends that the changing demographics of aging in the United States; changing federal regulations with regard to Medicare payments for elderly or chronically ill patients; and the emergence of health maintenance organizations have all resulted in

a shift in the population of nursing homes from elderly or disabled patients who need primarily maintenance care to patients who need medically complex short term care which can only be provided registered nurses with a BSN. In support of his assertions, counsel submits letters from Dr. Frederic M. Sherman and Mark McDougle, Executive Vice President of Long Island College Hospital in support of his assertions. Both of these individuals state that Cobble Hill Health Care Center needs more nurses with a BSN because it accepts patients with very complex medical conditions who require a higher level of nursing care than licensed practical nurses can provide. However, the Handbook clearly indicates that registered nurses working in a nursing home setting commonly work in specialty-care departments within nursing homes.

The petitioner has not submitted any evidence to show that the requirement of a BSN degree for supervisory or charge nurses is standard in the nursing home industry in the New York/New Jersey area.

Counsel states that the petitioner requires a BSN for the proffered position. It is noted that the petitioner's associate administrator stated in a letter dated January 8, 2001, that 14 out of the 52 registered nurses it employs have a BSN degree and 38 do not. While it appears that the petitioner prefers to hire nurses with a BSN degree, the evidence of record does not support a finding that the petitioner requires a BSN degree as part of the hiring process.

Additionally, the petitioner has not shown that the duties of the proffered position are so complex that they can be performed only by an individual with a BSN degree.

Counsel's argues on appeal that there is a critical shortage of qualified registered nurses in the nursing home industry in the United States. Nevertheless, the Service cannot remedy that situation by approving petitions for H-1B registered nurse positions where the petitioner has not shown that the position meets the statutory definition of a "specialty occupation." The fact remains that 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. See 8 C.F.R. 214.2(h)(4)(ii).

It is noted that counsel requests oral argument in this matter. A request for oral argument must set forth facts explaining why such argument is necessary to supplement the appeal. 8 C.F.R. 103.3(c). Oral argument is limited by regulation to cases involving unique facts or issues of law which cannot be adequately addressed in

writing. The request fails to set forth facts explaining why such argument is necessary, and the request must therefore be denied.

It is noted that counsel states in a letter dated September 5, 2001, that another petition filed by Cobble Hill Health Center on behalf of a registered nurse has been approved since this appeal was filed. However, 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. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.