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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 MASS, 3/F
Washington, DC 20536



MAY 01 2003

File: SRC 02 00251025

Office: TEXAS SERVICE CENTER

Date:

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:



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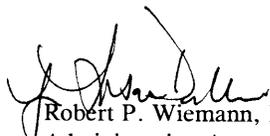
INSTRUCTIONS:

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 Bureau of Citizenship and Immigration Services (Bureau) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Florida nursing and rehabilitation center that has 110 employees and a gross annual income of \$7,389,000. It seeks to temporarily employ 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 was a specialty occupation.

On appeal, counsel asserts that the Bureau failed to apply the law correctly and failed to take into consideration the qualifications and licensure of the beneficiary or the complex and specialized nature of the services provided by the beneficiary.

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.

The term "specialty occupation" is defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

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 issue in this proceeding is whether the petitioner has established that the position offered to the beneficiary is a specialty occupation. In the initial I-129 petition filing received by the Texas Service Center on September 28, 2001, the petitioner described the proffered position as a registered nurse. The petitioner provided no supplemental description of the beneficiary's specific job duties.

The petitioner also submitted a copy of a registered nurse license from the State of Florida and from the State of California, along with a copy of a transcript of the beneficiary's university studies in the Ukraine in the subject field of industrial psychology and labor psychology. Finally the petitioner submitted an excerpt on registered nurses from the Department of Labor's (DOL) *Occupational Outlook Handbook*.

On January 14, 2002, the director requested further evidence for the instant petition. In particular, he asked for explicit documentary evidence to establish that the proffered position required a registered nurse with a bachelor of science in nursing degree and that the petitioner had consistently required others in the same position to hold at least a baccalaureate degree.

In response, counsel referred to *Matter of Gutierrez*, 12 I &N Dec. 418 (Dist. Dir. 1976) and stated that nurses have traditionally been regarded as professionals. Counsel also referred to excerpts from the Department of Labor (DOL) *Occupational Outlook Handbook* (Handbook) with regard to duties of nursing home nurses. In addition, the petitioner submitted a letter that stated it did not require a bachelor of science in nursing degree for employment. Counsel also drew attention to the shortage of registered nurses in the United States.

On May 16, 2002, the director denied the petition. He found that the petitioner had not established any of the criteria outlined in 8 C.F.R. § 214.2 (h) (4) (iii) (A).

On appeal, counsel asserts that the director did not apply the law correctly and failed to take into consideration the qualifications and licensure of the beneficiary. Counsel also asserts that the director failed to recognize the highly complex and specialized nature of the services provided by the beneficiary. Counsel submits a copy of the Nurse Practice Act of

the State of Florida contained in Chapter 464 of the 2001 Florida Statutes and the Nursing Practice Act of the State of California to illustrate the duties of and limitations on individuals employed as registered nurses. Based on these documents, counsel states that nursing duties are such that no ordinary person could perform them.

With regard to counsel's reference to *Matter of Gutierrez*, the Act at section 214(i) provides that 'the term "specialty occupation" means an occupation which requires ...(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.' The H-1B classification is no longer concerned with "membership in the professions" which was the standard examined by the court in *Gutierrez*. The language of section 214(i) of the Act effectively supersedes the *Gutierrez* decision. In addition, *Gutierrez* examined an immigrant petition, as opposed to the present non-immigrant petition.

Upon review of the record, the petitioner has not presented a persuasive argument for classifying the proffered position as a specialty occupation. In evaluating whether the proffered position is a specialty occupation, each of the four criteria listed at 8 CFR § 214.2(h)(4)(iii)(A) will be considered separately below.

I. 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 Bureau often looks to the 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.

The basic duties of registered nurses as outlined in the 2002-2003 edition of the *Handbook* on page 268 are as follows:

Registered nurses (RNs) work to promote health, prevent disease, and help patients cope with illness. . . . When providing direct patient care, they observe, assess, and record symptoms, reactions, and progress; assist physicians during treatments and examinations; administer medications; and assist in convalescence and rehabilitation. RNs also develop and manage nursing care plans; instruct patients and their families in proper care; and help individuals and groups take steps to improve or maintain their health. . . . While State laws govern the tasks that RNs may perform, it is usually the work setting that determines their daily job duties.

Counsel has already placed on the record the duties of nursing home nurses, so these duties will not be repeated in this proceeding. On page 269, the *Handbook* 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.

. . . .

. . . [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.

To the extent that a two-year associate's degree in nursing is sufficient to perform the duties of an entry level registered nurse, it does not appear that a bachelor of science degree in nursing is the minimum requirement for entry into the nursing field. Accordingly, the *Handbook* does not support a finding that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for an entry level nursing position.

In the instant petition, the petitioner has placed no evidence on the record as to the duties of the proffered position. Only on appeal, does counsel state that the proffered position is for a nursing home nurse. In addition, the record is devoid of any information that would suggest the proffered position is any other than an entry-level registered nurse position.

With regard to nursing specialties or certified nursing practices that might be found to be H-1B eligible, on November 27, 2002, the Immigration and Naturalization Service, now the Bureau of Citizenship and Immigration Service, (Bureau) issued a policy memorandum on H-1B nurse petitions (nurse memo).¹ On page two, the memo refers to certified advanced practice registered nurses (APRNs) and contrasts the educational requirements for APRNs with those of general registered nurse positions.

The policy memo also acknowledges that an increasing number of nursing specialties, such as critical care and operation room care, require a higher degree of knowledge and skill than a typical RN or staff nurse position and speaks to administrative nursing positions and nurse manager positions possibly being H-1B eligible. Without more persuasive evidence, however, the petitioner has not established that the proffered position is any of the positions mentioned in the nurse memo or that the beneficiary is qualified to perform the duties of any of the positions mentioned in the nurse

¹ Memorandum from Johnny N. Williams, Executive Associate Commissioner, 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.)

memo. Accordingly, the petitioner has not established that the proffered position would require an individual to possess a baccalaureate degree or its equivalent to enter into the job.

II. 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 - 8 C.F.R. § 214.1(h) (4) (iii) (A) (2)

A. Degree Requirement is Common to the Industry

Factors often considered by the Bureau when determining whether a degree is common to the industry include: whether the Department of Labor's (DOL) *Occupational Outlook Handbook (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 *Handbook's* conclusions about a degree requirement for a registered nurse position were discussed in the previous section, and shall not be repeated here. In the instant petition, the petitioner submitted no further documentation, such as job postings for nursing employees of nursing homes of similar size and similar level of care, to establish the criterion. The only letter placed on the record was that of the petitioner stating that it did not require its nursing employees to have a baccalaureate degree.

In addition, the petitioner submitted no documentation that any professional nursing home association has made a bachelor's degree a requirement for entry into the field. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

B. Complexity and Uniqueness of the Proffered Position

In the alternative, the petitioner may show that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant petition, counsel presents excerpts from the Nurse Act of the State of Florida that outline the duties for nurses. These excerpts, however, add nothing to the record with regard to the complexity and uniqueness of the actual position at Avante at Ormond Beach. In addition, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

The record is devoid of any evidence with regard to the actual position of the beneficiary that would demonstrate its complexity and uniqueness. Without more persuasive evidence, the petitioner has not established either that a degree is common to the nursing

industry standard or that the position is so unique or complex that it can only be performed by a person with a baccalaureate degree.

III. The employer normally requires a degree or its equivalent for the position - 8 C.F.R. § 214.2(h) (4) (iii) (A) (3)

With regard to the instant petition, the petitioner submitted a letter for the record that stated it did not require a baccalaureate degree for its nursing employees.

IV. 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 - 8 C.F.R. § 214.2(h) (4) (iii) (A) (4)

The nurse memo previously mentioned also states that petitioners, through affidavits from independent experts or other means, could demonstrate that the nature of these positions' duties are 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.) Nevertheless, in the instant petition, the record is devoid of any information provided by the petitioner as to the actual nursing position at Avante at Ormond Beach. As stated previously, the generic information on the duties of nurses contained in either the California or Florida statutes does not establish the complex or specialized nature of the actual nursing position. Thus, the petitioner has not established the specialized and unique nature of the actual position. Accordingly, it is concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of the regulations.

Beyond the decision of the director, it is not clear that the beneficiary is qualified to perform the duties of the proffered position. For example, the record only contains transcripts of the beneficiary's university studies in industrial and labor psychology. There is no evidence on any training in nursing at either an associate level or at a baccalaureate level in the United States or in a foreign country. Since this petition will be dismissed on other grounds, this issue will not be examined further.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.