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20 Mass. Rm. A3042, 425 I Street, N.W.
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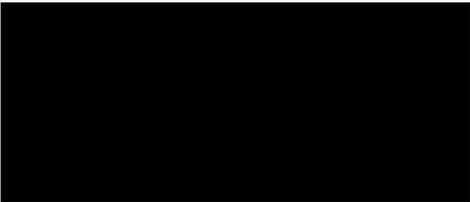
DZ

FILE: EAC 02 293 53748 Office: VERMONT SERVICE CENTER Date: **APR 26 2004**

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.

Mari Johnson

RP
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director 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 record indicates that the beneficiary is presently employed by another healthcare facility as a nurse supervisor pursuant to an approved H-1B classification as a nonimmigrant worker in a specialty occupation, in accordance with 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 petitioner endeavors to have this classification extended, so that it may hire the beneficiary as a registered nurse (RN) supervisor.

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits: a brief; an affidavit attesting that, three years earlier, Citizenship and Immigration Services (CIS) approved the beneficiary to work as an H-1B non-immigrant worker in a nursing supervisor position for a different healthcare provider; and other documentary evidence.

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.

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) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief, together with

counsel's affidavit and other attached documents. The AAO reviewed the record in its entirety before issuing its decision.

Although the duties are more fully detailed elsewhere in the record, this excerpt from the petitioner's letter of support generally encompasses the nature of the proffered position:

The position we offer to [the beneficiary] is that of a Registered Nurse Supervisor in our facility. As such, [the beneficiary] will be involved in all aspects of the nursing care program. [She] will plan, direct and supervise nursing care, supervise the administration of tests, treatment and procedures[,] and participate in nursing research. [She] will supervise staff nurses and be responsible for nursing activities in a unit.

In addition to the above duties, [the beneficiary] will be expected to maintain the knowledge of current developments in the field of nursing by reading and attending seminars and in service training programs. [She] will be supervised by the Director of Nursing.

The director's decision to deny the petition was correct. As discussed below, the evidence of record does not establish the proffered position as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A).

The evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(I), which provides for specialty occupation qualification of those positions whose normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty.

The director was correct in finding that the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* indicates that a Bachelor of Science in Nursing (BSN) is not a normal requirement for RN positions similar to the one proffered here. As the AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations, the *Handbook's* information was decisive in the AAO's determination on this first criterion of 8 C.F.R. § 214.2 (h)(4)(iii)(A).

The director correctly noted that the approval of an H-1B petition filed by a different employer has no bearing on this petition, even if the beneficiary and the job title were the same as in the instant petition. 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).

The job vacancy advertisements from other healthcare institutions are too limited in content, number, and geographic locality to overcome the *Handbook's* authoritative information to the effect that a person with an associate degree or hospital diploma in nursing has the specialized knowledge required to perform as a nursing supervisor.

Despite counsel's view to the contrary, the fact that a BSN involves more coursework than the other academic avenues to an RN license does not endow the BSN holder with substantially more nursing specialty knowledge than the holder of a nursing associate or diploma degree. Also, counsel provides no evidentiary basis for his assertion, "Any nurse supervisor in the industry if holding only a diploma degree must have at

least 3 to 6 years of experience[,] depending on the program[,] [to qualify as a nurse supervisor].” Counsel also states, without a documentary basis, that a nursing supervisor position “is equivalent to or of equal responsibilities as that of an Assistant Director, Nurse Manager, Head Nurse, etc.” 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).

Counsel incorrectly interprets an SVP rating of 8 as “showing the necessity of a Bachelor’s degree or equivalent for this position.” SVP ratings do not establish an equivalency of experience and a bachelor’s degree in a specific specialty, and they do not specify a degree in a specific specialty as a requirement for any position.

Next, the evidence of record did not has not satisfy the first prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2) by establishing that a degree requirement is common to the industry in parallel positions among similar organizations.

Factors often considered by CIS when determining this criterion 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. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

As already discussed, the *Handbook* does not report an industry-wide degree requirement for the type of position proffered here. The record also lacks evidence from firms, individuals in the industry, or professional associations about routinely recruiting and employing only those with a BSN.

In addition, the job vacancy advertisements from other healthcare institutions are not persuasive evidence of an industry-wide requirement for a BSN for nursing supervisor positions. The advertisements are too few and too geographically limited, and they include a significant number of advertisements from hospitals, which are institutions with a wider range of healthcare functions and challenges than nursing homes.

The AAO also found that the evidence of record does not qualify the proffered position under the second prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2), that is, so complex or unique that it can be performed only by an individual with a degree in a specific specialty. The record contains no persuasive evidence that the proffered position is unique from or substantially more complex than a usual nurse supervisor position at a nursing home, and the record does not establish that such a position requires a BSN.

Next, the past-hiring-practice criterion at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(3) is not a factor. The petitioner presented documentation only as to the three nurse supervisors at the nursing home since 2001, and it presented no meaningful information about the persons who held nurse supervisor positions under the nursing home’s former operator. Also, one of the three nurse supervisors presently employed holds only a nursing diploma, and the AAO is not persuaded by counsel’s contention that this particular RN holds the equivalent of a BSN by combination of her experience and her education.

Finally, the AAO turned to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) – the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The evidence in the record does not establish that

the specific duties proposed here are so complex or specialized as to render irrelevant the *Handbook's* information to the effect that nurse supervisor positions are not normally associated with a BSN.

The AAO notes that on November 27, 2002, CIS issued a policy memorandum on H-1B nurse petitions and acknowledged that an increasing number of nursing specialties require a higher degree of knowledge and skill than a typical RN staff nurse position.¹ The evidence of record, however, does not establish that performance of the proffered position would require a level of skill and knowledge associated exclusively with a BSN. It appears that the proffered position is within the performance range of an RN with an associate degree or nursing diploma.

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

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