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U.S. Citizenship
and Immigration
Services

DA



FEB 02 2004

FILE: EAC 02 242 52029 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



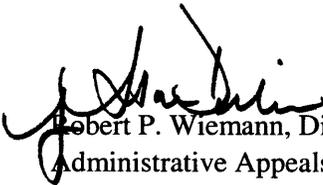
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H) (i) (b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i) (b)

ON BEHALF OF PETITIONER:



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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a nursing home health care facility that seeks to employ the beneficiary as a charge nurse. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to 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 director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

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.

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) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a charge nurse. Evidence of the beneficiary's duties includes: the Form I-129; the petitioner's addendum to the I-129 that lists specific duties and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform the

following duties: supervise and coordinate activities of nursing personnel engaged in specific nursing services for two or more patient care units to insure patient needs are met in accordance with the physicians' instructions and with the petitioner's administrative procedures; plan units' activities and coordinate activities with other patient care units; consult with the head nurse on specific nursing problems and interpretation of petitioner's policies; plan and organize orientation and in-service training for unit staff members, and participate in guidance and educational programs; assist in formulating unit budget; and engage in studies and investigations related to improving nursing care. The vacancy announcement submitted by the petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in nursing (BSN) as well as a registered nurse license for the State of New York, and at least one year of sub-acute/long term care nursing experience.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director noted that the petitioner had not established that the industry standard required a baccalaureate degree in nursing for entry into the proffered position, and, according to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, an individual does not need to hold a baccalaureate degree in nursing to fill a registered nurse position.

On appeal, counsel states that the petitioner has met two criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A), namely, that the position requires a baccalaureate degree for entry into the position, and that the duties of the position are so complex and unique that it could only be performed by an individual with a baccalaureate degree. Counsel states that the position is much more complex than a typical registered nurse position with additional first-line supervisory responsibilities. In support of this assertion, counsel provides the following job duties performed by the charge nurses employed by the petitioner:

1. Assume full responsibility for the functioning of their units, including the supervision of nursing assistants;
2. Care and treatment of geriatric patients;
3. Deliver acute care services, i.e., intravenous IV therapy, decubitus (wound) care, tracheotomy care, gastro-feeding tube care, comfort and hospice care;
4. Communicate with the resident families [sic] on [a] regular basis;
5. Perform charting and care planning;
6. Administer medication;
7. Make recommendations to physicians regarding plans of care.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. With regard to the instant petition, the petitioner indicated in its addendum to the I-129 petition, that the proffered position was a supervisory position with very little, if any, direct provision of nursing care. In contrast, on appeal, counsel provides a list of duties that includes, among others, "care and treatment of geriatric patients," "delivery of acute care services," and the administration of medicines, among others. In addition, the position description submitted by the petitioner for its charge nurses, contains duties such as "implementing plan of care," and "executing nursing interventions." Upon review of these descriptions, it appears the proffered position is that of a registered nurse, beyond entry level, with supervisory authority over other health care employees, while maintaining ultimate responsibility for nursing care provided to patients. As stated by the director, no evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a registered nurse position. It should also be noted that the fact that the petitioner states on its job description and job vacancy that it requires a baccalaureate degree does not establish that the proffered position is a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation, regardless of the petitioner's past hiring practices. Cf. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ In this regard, the petitioner fails to establish that the registered nurse position it is offering to the beneficiary entails the theoretical and practical application of a body of highly specialized knowledge.

Regarding parallel positions in the petitioner's industry, the petitioner submitted no further documentation. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. In its response to the director's request for further evidence, the petitioner submitted the resumes of five employees, along with evidence of their current nursing licenses. The petitioner also submitted payroll information as of 7/20/2002 for four of the employees. All five employees listed their academic credentials in their resumes. There are several problems with this documentation. First, the record is not clear that these employees perform the job of charge nurse for the petitioner, or whether there are other employees who also perform the duties of charge nurse. Second, it is not clear from the documentation as to whether all five employees have the equivalent of a four-year baccalaureate degree in nursing. For example, the resume for Mary McNiff states that she studied for three years at Kettering General Hospital Training School in England. Without further explanation or documentation, this period of time does not appear to be the equivalent of a four-year baccalaureate degree in nursing. Without more persuasive documentation, such as the actual number of charge

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." See *id.* at 387.

nurses employed by the petitioner, and a more precise explanation of their academic credentials, the petitioner has not established its past hiring practices.

Finally, the AAO turns to the criterion 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 the duties is usually associated with the attainment of a baccalaureate or higher degree.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. As previously noted, there appears to be some differences in the duties outlined by the petitioner in the original petition and by counsel on appeal with regard to the provision of direct nursing care. Nevertheless, neither list of job duties necessarily established the complexity or uniqueness of the duties of the proffered position. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO notes that on November 27, 2002, CIS issued a policy memorandum on H-1B nurse petitions (nurse memo) and acknowledged that an increasing number of nursing specialties require a higher degree of knowledge and skill than a typical registered nurse position.² In this matter, however, nothing in the proffered position's job description indicates that the beneficiary would be working in a nursing specialty that requires a higher degree of knowledge or skill. An individual who does not possess a BSN or its equivalent would be able to successfully execute the duties that the petitioner describes.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

With regard to the beneficiary's qualifications to perform the duties of the proffered position, it is noted that both the job vacancy and the job description for charge nurse submitted by the petitioner indicated that from one to three years of experience in sub acute/long term nursing care was required to enter into the position. Although the petitioner stated in its I-129 petition that the beneficiary had one year of nursing experience as a night supervisor, no further information is found in the record as to the nursing area in which the beneficiary acquired her one year of nursing experience. In addition, there does not appear to be an educational equivalency evaluation in the record, as required by the regulatory criteria for H-1B visa petitions. However, as the AAO is dismissing the appeal because the job is not a specialty occupation, it will not discuss the beneficiary's qualifications.

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. The petition is denied.

² 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).