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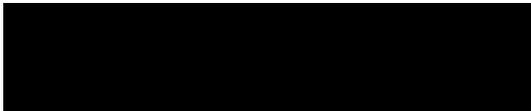


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FILE: EAC 02 145 51084 Office: VERMONT SERVICE CENTER Date:

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.

Mari Johnson

for 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 petitioner is a hospital that seeks to employ the beneficiary as a registered nurse assigned to the intensive care unit (ICU). 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 and the beneficiary is not qualified to perform a specialty occupation. On appeal, counsel submits a brief.

The AAO will first address the director's conclusion that the position is not 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.

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 registered nurse. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's January 22, 2002 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail caring for patients in the intensive care unit. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in nursing.

The director found that the proffered position was not a specialty occupation. Citing to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the proffered position qualifies as a specialty occupation, in accordance with the November 27, 2002 CIS policy memorandum on H-1B nurse petitions (nurse memo), acknowledging that an increasing number of nursing specialties require a higher degree of knowledge and skill than a typical registered nurse staff nurse position.¹ Counsel submits three industry opinions, a copy of a recent *Journal of the American Medical Association (JAMA)* study, and information from the American Association of Colleges on Nursing (AACN) and the Department of Veterans Affairs (VA), in support of his claim that the proffered position requires a baccalaureate degree. Counsel submits examples of curricula from various nursing programs to demonstrate that the extra education received in the baccalaureate program is crucial to filling critical care and other specialty care positions in its facility. Counsel states that in-depth courses dealing with critical care nursing, theory of nursing, and leadership in the profession are not available in the associate program. Counsel further states that the degree requirement is industry wide, and the director has previously approved petitions for similar registered nurse positions.

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.

First, the AAO does not agree with counsel's assertion that the proffered position would normally require a bachelor's degree in nursing or a related field. The proffered position is that of a registered nurse who will work in the intensive care unit. A review of the DOL's *Handbook*, 2004-2005 edition, finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a registered nurse. The three educational paths to nursing are as follows: Bachelor of Science degree in nursing (B.S.N.), Associate degree in nursing (A.D.N.), and diploma. The *Handbook* further states:

[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 is a prerequisite for admission to graduate nursing programs in research, consulting, teaching, or a clinical specialization.

As the record does not demonstrate that the beneficiary's proffered position is primarily an administrative position, or a graduate nursing program in research, consulting, teaching, or a clinical specialization, it is

¹ Memorandum from [REDACTED] 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).

concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of the regulations. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

In the petitioner's January 22, 2002 letter, the petitioner's president and CEO notes that the director had approved other H-1B petitions for registered nurses in rural areas of New York and Pennsylvania. On appeal, counsel asserts that CIS has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior cases. In the absence of all of the corroborating evidence contained in those records of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the other H-1B petitions were parallel to the proffered position. Furthermore, the AAO is never bound by a decision of a service center or district director. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), *aff'd*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

It is additionally noted that, even if the petitioner were to demonstrate that all of its registered nurses in the intensive care unit hold baccalaureate degrees, the petitioner's reasoning would be problematic when viewed in light of the statutory definition of specialty occupation. The petitioner's creation of a position with a perfunctory bachelor's degree requirement would not mask the fact that the position is not a specialty occupation. As with employment agencies as petitioners, the AAO must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation.

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 bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.² To interpret the regulations any other way would lead to absurd results: if the AAO was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. *See id.* at 388.

In this case, although the petitioner claimed to have hired only individuals with a bachelor's degree in nursing for its registered nurse positions assigned to the intensive care unit, the position, nevertheless, does not meet the statutory definition of specialty occupation. The position, itself, does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though the petitioner may have required a bachelor's degree in the past, the position still does not require a bachelor's degree in a specific specialty.

The petitioner also did not present any documentary evidence that a baccalaureate degree in a specific specialty or its equivalent is common to the industry in parallel positions among organizations similar to the petitioner. The article in the record from the AACN concerning its collaborative agreement with the VHA and the VA is noted. The article states that the VA has committed to designate \$50 million over the next five years to assist its nursing workforce to attain the baccalaureate or higher degree. The VA, however, not only is the largest

² The court in [redacted] 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." *Supra* at 387.

employer of registered nurses in the nation, but has specific hiring requirements for its registered nurse positions that are not common throughout the industry.

On appeal, counsel submits an article entitled "*HIGH PATIENT-TO-NURSE RATIOS IN HOSPITALS ASSOCIATED WITH MORE PATIENT DEATHS AND INCREASED NURSE BURNOUT AND JOB DISSATISFACTION*" from the *JAMA, Science News Update October 23/30, 2002*, which addresses, in part, the burdensome workload of nurses. Counsel asserts that CIS's refusal to accept that critical care and other specialty nurse positions require the knowledge obtained in a baccalaureate education, or an equivalent thereof, will result in an increase in the rate of patient death due to registered nurses not being present in sufficient numbers. Nowhere in this article, however, does the *JAMA* arrive at the same conclusion as counsel. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); [REDACTED] 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also submits the curriculum for a Bachelor of Science degree in nursing from the Department of Nursing at Nazareth College and from the College of Nursing at Kent State University. He also submits program information concerning the philosophy of the Associate of Science in Nursing program and the Bachelor of Science in Nursing program from IU Northwest School of Nursing. Counsel states: "**Petitioner believes that the extra education received in the baccalaureate program is crucial to filling critical care and other specialty care positions in its facility. Petitioner believes that a baccalaureate education or the equivalent is needed to adequately fill the position.**" Counsel goes on to say that courses that deal with critical care nursing, theory of nursing, and leadership in the profession are not available in the associate program.

The record, however, contains no accompanying documentation that provides a description of the content of each course of both degree programs. Without complete course descriptions of both degree programs, there is little evidence to support the petitioner and counsel's assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena, id; Matter of [REDACTED]* Additionally, 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).

The record contains opinions from the following three individuals: Theresa Gallagher Balog, Assistant Professor of Nursing, School of Nursing, College of Health and Human Development, Penn State University New Kensington [REDACTED] Ph.D., CHE, Hospital Council of Western Pennsylvania [REDACTED] Ph.D., RN, Associate Dean for Nursing, Robert Morris University. All assert that a baccalaureate degree in nursing is required for positions such as the proffered position. The writers, however, do not provide any evidence in support of their assertions. Simply going on record without supporting documentary evidence, however, is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, id.* Additionally, the text of the letters is identical. Thus, the AAO must question whether the opinions expressed in each letter are the views of each author.

Counsel alleges that CIS approves H-1B classification for beneficiaries seeking registered nurse positions in the state of North Dakota, while discriminatorily denying this classification to beneficiaries seeking registered nurse positions in the state of Pennsylvania. Counsel alleges that because an RN position in the two states has essentially the same specialized and complex duties, the RN positions in both states should be specialty occupations. This allegation is not persuasive. According to the nurse memo, the National Council on State Boards of Nursing (NCSBN) had previously confirmed that the state of North Dakota was the only state that required that an individual possess a bachelor of science in nursing (BSN) in order to be licensed as

a registered nurse in that state. According to the nursing memo, in a situation in which the BSN is a prerequisite to practicing in the field, the position will qualify as an H-1B position. While the nurse memo specifically provided “a petition for an RN position in the state of North Dakota will generally qualify as an H-1B position due to the degree requirement for licensure,” effective August 1, 2003, the state of North Dakota no longer requires a BSN for licensure by examination. The state is now required to “adopt rules establishing standards for the approval of out-of-state nursing education programs,” which may include non-BSN nursing education. Section 43-12.1-09 of the North Dakota Nurse Practices Act. Accordingly, a position for a registered nurse within the state of North Dakota is no longer automatically considered an H-1B position because the degree requirement no longer exists. Counsel’s argument is moot.

Finally, 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, such as critical care and operating room care, require a higher degree of knowledge and skill than a typical RN or staff nurse position.³ However, the mere fact that a nursing position has a title such as “critical care” does not necessarily mean that it qualifies as a specialty occupation.⁴

The AAO looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. While the nurse memo specifically states that a petitioner may be able to demonstrate, through affidavits from independent experts or other means, that the nature of the position’s duties is 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), the AAO maintains discretion to use as advisory opinions statements submitted as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The AAO must be satisfied that the ultimate employment of the alien is in a specialty occupation, regardless of the position’s title.

Although the proffered position is that of a registered nurse assigned to the recovery room, the duties of the position do not entail any specialized or complex responsibilities that involve the theoretical and practical application of a body of highly specialized knowledge. Rather, the duties assigned to the beneficiary are routine to many registered nurse positions. Just because the beneficiary would perform these duties in the intensive care unit does not elevate the duties’ complexity. As the record is presently constituted, the AAO cannot find that the job fits the criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.

³ Memorandum from [REDACTED] 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).

⁴ It is worth noting that the nurse memo also mentions that certification examinations are available to such registered nurses who may work in such nursing specialties and possess additional clinical experience, but who are not advanced practice nurses.

The AAO will now address the director's conclusion that the beneficiary is not qualified to perform a specialty occupation.

Section 101(a)(15)(H)(i)(b) of 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(v):

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.

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 Commonwealth of Pennsylvania, the petitioner submitted a copy of the beneficiary's Bachelor of Science in Nursing degree conferred by a Filipino institution, as well as copies of the Registered Nurse Certificate and license issued to the beneficiary by the Professional Regulation Commission, Board of Nursing, in the Philippines. The director found that the beneficiary was not qualified for the proffered position because the petitioner has not demonstrated that the beneficiary is licensed or otherwise eligible to practice registered nursing in the intended state of employment.

On appeal, counsel states that the beneficiary cannot take and pass the registered nursing licensing examination until the beneficiary enters the United States. In its January 22, 2002 letter, the petitioner's president and CEO states that the beneficiary will be evaluated by the Commission on Graduates of Foreign Nursing Schools (CGFNS) for licensure prior to coming to the United States, and that, as the Commonwealth of Pennsylvania does not offer the NCLEX outside the United States, the beneficiary will be able to take the NCLEX soon after entering the United States.

Pursuant to The Pennsylvania Code § 21.28. Licensure by endorsement:

(c) A registered nurse who has graduated from a nursing program in a country or territory outside of the United States or Canada and who is licensed by completing the National Council Licensure Examination in another jurisdiction of the United States or Canada may be granted licensure in this Commonwealth without examination if the applicant's program of study is deemed equivalent to the program of study required in this Commonwealth without examination if the applicant's program of study is deemed equivalent to the program of study required in this Commonwealth at the time the program was completed. The Board will base equivalency upon an evaluation performed by the Commission of Graduates of Foreign Nursing Schools (CGFNS) as to the foreign nursing program.

The record contains no evidence that the beneficiary has successfully completed both the CGFNS qualifying examination and the Test of English as Foreign Language (TOEFL). Nor does the record contain evidence that the CGFNS has performed an evaluation of the beneficiary's credentials, deeming them equivalent to a program of study required by the Commonwealth of Pennsylvania.

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

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.